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Public Regulation and Private Enforcement in a Global Economy: Strategies for Managing Conflict

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PUBLIC REGULATION AND PRIVATE ENFORCEMENT IN A GLOBAL ECONOMY: STRATEGIES FOR MANAGING CONFLICT

by

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CHAPTER I

INTRODUCTION

The global regulatory environment has become increasingly dense. It features multiple forms of regulation, including multilateral treaties, administrative rulemaking, self-regulation, and private enforcement in domestic courts. Regulatory institutions operate on national, regional, and international scales – and in an increasing range of substantive fields. Unsurprisingly, this environment engenders frequent conflict among regulatory regimes. Two episodes illustrate some of the forms this conflict can take.

The first arises in the area of securities regulation [1]. In the early 2000s, evidence emerged suggesting that Deutsche Telekom, the German telecommunications conglomerate, had misled its investors by overstating the value of certain assets. Thousands of German investors commenced individual lawsuits against Telekom in German courts, seeking damages for harm caused by the alleged fraud [2]. In addition, the public prosecutor in Bonn launched a criminal investigation against a number of former Telekom employees. In the meantime, American investors, who had purchased Telekom's securities on the New York Stock Exchange, initiated a class action lawsuit against the company in a US court.

The plaintiffs in the US class action demanded that Telekom produce certain documentary evidence being held by the public prosecutor in Bonn. The prosecutor granted Telekom permission to copy the documents and make them available for the American lawsuit, but on the condition that they be used exclusively in connection with the class action. The US court agreed with that condition and issued an

1. The description of this case is drawn primarily from the statement of facts in *Schmitz* v. *Bernstein Liebhard & Lifshitz, LLP*, 376 F. 3d 79 (2d Cir. 2004). An account of the litigation is also provided in A. Tilp, "Das Kapitalanleger-Musterverfahrensgesetz: Stresstest für den Telekom-Prozess", *Festschrift für Achim Krämer zum 70. Geburtstag* (U. Blaurock, J. Bornkamm and C. Kirchberg, eds., 2009), pp. 331-360, and M. Halberstam, "The American Advantage in Civil Procedure? An Autopsy of the Deutsche Telekom Litigation", 48 *Connecticut Law Review* 817 (2016).

2. The challenge of addressing such a large number of individual claims led Germany to adopt a new regulatory instrument, the Capital Market Model Claims Act (Kapitalanleger-Musterverfahrensgesetz). This law introduced a "test case" procedure to streamline the litigation process in situations involving mass claims of investors. See Tilp, *supra* footnote 1.

appropriate protective order regarding the evidence. The plaintiffs in the German cases sought access to this evidence as well, but the public prosecutor in Bonn denied their request. Those plaintiffs responded by seeking the assistance of the US court pursuant to a procedural rule that authorizes US federal district courts, in their discretion, to order testimony or document production in the United States for use in a foreign proceeding [3]. Invoking that rule, the German plaintiffs sought an order requiring the law firms representing the American investors to turn over the evidence they had gathered.

The public prosecutor in Bonn protested the German plaintiffs' request, arguing that he had already denied the German investors access to these documents, and did not want the US court to circumvent his restrictions. He further stated that turning the documents over to the German plaintiffs might infringe upon the rights of the Telekom employees who were defendants in the ongoing criminal investigation in Germany, thereby jeopardizing that investigation. The German Ministry of Justice likewise protested the request, arguing that disclosure of the documents would infringe upon Germany's rights as a sovereign nation. That objection, in turn, gave rise to speculation that the German Government was acting out of political and economic interest, attempting to protect its stake in Deutsche Telekom.

Based on various objections to the plaintiffs' motion, the Second Circuit Court of Appeals upheld the decision of the district court to deny the discovery request [4]. Four years later, however, a German court hearing one of the Telekom cases ordered the defendants there to produce some of the depositions and exhibits used in the US litigation. The court ruled that the plaintiffs in the German proceeding, drawing on their knowledge of the information revealed in the US litigation, had provided sufficient proof to obtain the order under German procedural rules [5].

The second illustration emerges from the area of taxation [6]. In 1991, the Canadian Government doubled its tax on the sale of cigarettes.

3. 28 USC, § 1782(a). See generally *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 US 241 (2004), at 247-249 (discussing the history and purpose of this provision).

4. *Schmitz* v. *Bernstein Liebhard & Lifshitz, LLP*, 376 F. 3d 79 (2d Cir. 2004), at 85.

5. Oberlandesgericht Frankfurt/Main [OLG Frankfurt/Main] 6 August 2008.

6. This case is reported in *Attorney General of Canada* v. *R.J. Reynolds Tobacco Holdings, Inc.*, 268 F. 3d 103 (2d Cir. 2001). The European Community filed a similar lawsuit against tobacco manufacturers that was decided by the US Supreme Court in 2016. *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016). That case is discussed in detail in Chapter III.

Following that increase, R.J. Reynolds, a US cigarette manufacturer, experienced a significant decline in the sales of its Canadian subsidiary. The manufacturer and its subsidiary then allegedly developed a scheme to avoid paying the full amount of sales tax. The scheme involved manufacturing cigarettes in Canada, exporting them to the United States, and then selling them to distributors who smuggled the cigarettes back into Canada, reselling them on the black market. As a result, the Canadian Government lost substantial tax revenue and incurred additional law enforcement costs.

A bilateral tax treaty between Canada and the United States covers matters such as the double taxation of corporate enterprises engaged in cross-border business, the availability of credit for foreign taxes paid, and so forth [7]. The treaty also provides for the exchange of information between tax authorities in the two countries. And in very narrow circumstances, it provides for assistance in the collection of tax claims. However, this collection assistance does not apply to all tax claims levied by authorities in the taxing country; instead, it applies only to claims that have been fully adjudicated in the taxing country. It also does not apply to claims against foreign companies – only to claims against companies of the taxing country who are trying to shield assets located abroad. As a result of these limitations, the tax treaty did not help the Canadian Government with its claims against R.J. Reynolds.

Instead, the Canadian Government filed a lawsuit in US federal court under the Racketeer Influenced and Corrupt Organizations Act (RICO), a law that permits the victims of organized crime activity to sue the perpetrators of that activity for damages in ordinary civil litigation [8]. The Canadian Government's claim was dismissed, however, on the basis that adjudication of those claims would violate the "revenue rule". This rule provides that the courts of one sovereign nation will not enforce tax judgments of another [9]. The traditional justification for the rule is that it "prevent[s] foreign sovereigns from asserting their sovereignty within the borders of other nations, thereby helping nations maintain their mutual respect and security" [10].

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7. Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital done at Washington on 26 September 1980 (as amended).

8. 18 USC, §§ 1961-1968.

9. See discussion of the rule in H. Baade, "The Operation of Foreign Public Law", 30 *Texas International Law Journal* 429 (1995), at 482-488.

10. *Attorney General of Canada* v. *R.J. Reynolds Tobacco Holdings, Inc.*, 268 F. 3d 103 (2d Cir. 2001), at 111.

These illustrations prompt several observations about the sources and nature of conflict in transnational regulation. First, and most obviously, corporate activity often triggers regulatory action in more than one country. Second, that action often generates interesting engagements between public and private forms of regulation. In the Telekom example, for instance, a public criminal proceeding and private litigation under German securities laws took place simultaneously. In the R.J. Reynolds example, the Canadian Government itself turned to private litigation to vindicate its rights. Third, cross-border regulation generates equally interesting engagements between domestic law and international law. The plaintiffs in the Telekom case sought assistance under US procedural law partly because that law permits more extensive discovery of evidence than does the Hague Convention on Discovery of Evidence Abroad, a multilateral treaty to which both Germany and the United States are party [11]. In the *R.J. Reynolds* case, the plaintiff sought the application of US law against the backdrop of a treaty framework regulating cross-border taxation.

In sum, as the illustrations demonstrate, the conflicts that arise in the course of international economic regulation involve more than just collisions of substantive legal norms. They also involve concerns about the "who" and "how" of regulation. The entity seeking to enforce a particular norm might be a public agency or a private litigant; a particular proceeding might unfold within an international treaty framework or outside it. Such factors affect the degree of resulting conflict quite significantly. Understanding that conflict, and assessing the efficacy of the tools used to resolve it, therefore requires an analysis that accounts for those factors.

The objective of the chapters that follow is to develop a framework for examining conflicts in cross-border economic regulation, and to use it in assessing various regulatory mechanisms. The analysis employs a trans-substantive approach, providing examples from diverse areas including competition regulation, securities regulation, and data privacy. However, instead of organizing the discussion by subject matter, it classifies different categories of conflict – substantive, procedural, and political – and examines each in turn. This approach permits a nuanced analysis of cross-border regulation as it is practised by different institutions. In particular, it uncovers the layering of

11. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. The Convention is discussed in further detail in Chapter IV.

different forms of conflict that makes particular modes of regulation especially problematic.

The analysis draws most heavily on the experience in the United States, which permits a special focus on one specific question of regulatory design: the role of private enforcement in transnational regulation. Historically, the United States has been an outlier in its reliance on private civil litigation as a regulatory instrument. Today, though, many other legal systems are engaged in procedural reform intended to support more robust private enforcement. That development has the potential to increase significantly the resources devoted to economic regulation. However, it also risks exacerbating conflict in cross-border cases. Accordingly, one goal of the following discussion is to use the analytical framework developed here to consider possibilities for integrating private enforcement more effectively into the transnational regulatory environment.

CHAPTER II

TRANSNATIONAL REGULATION AND GLOBALIZATION

A. Introduction

According to the traditional model of economic regulation, regulatory authority is vested in individual nation States, on the assumption that each nation State has the exclusive and absolute right to regulate conditions within its own borders. F. A. Mann describes this model as follows:

> "Jurisdiction is an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by, the State's sovereignty. As Lord Macmillan said, 'it is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all cases, civil and criminal, arising within these limits'. If a State assumed jurisdiction outside the limits of its sovereignty, it would come into conflict with other States which need not suffer any encroachment upon their own sovereignty . . . Such a system seems to establish a satisfactory regime for the whole world. It divides the world into compartments within each of which a sovereign State has jurisdiction." [12]

This model presupposes that the location of a transaction or event, and of its impact, can be readily ascertained. It also functions most effectively if both the transaction or event and its impact are located within the boundaries of a single State.

This chapter explores two trends – transnationalization and deterritorialization – that seriously challenge these assumptions [13]. It then examines how regulatory strategies have evolved to meet these challenges, surveying the tools regulatory institutions use to address the realities of the contemporary global economy. The chapter suggests that these tools have been quite successful in improving co-operation and

12. F. A. Mann, "The Doctrine of Jurisdiction in International Law", 111 *Recueil des cours* 1 (1964), at 30.

13. For further explication of these trends, see R. Michaels, "Territorial Jurisdiction after Territoriality", in *Globalisation and Jurisdiction* (P. Slot and M. Bulterman, eds., 2004), 105.

co-ordination among national regulators, particularly in the domain of public enforcement. But they have not succeeded in freeing regulation from the confines of territorialism. For the most part, economic regulation continues to operate at the level of the nation State. The result is a growing mismatch between the scale of economic activity and actors, on the one hand, and the scale of regulation, on the other. This mismatch in turn creates significant areas of conflict as the actions of national regulatory institutions overlap in the global arena.

B. Transnationalization

1. The transnational nature of economic actors

The evolution of multinational enterprises is striking. Many corporate groups have grown to encompass a larger number of companies operating in a greater number of countries. Such entities utilize a variety of means, not just equity ownership, to bind together the operations of individual entities across borders. The ranks of multinational enterprises include not only traditional corporate groups but also franchise networks and international production consortia, among other forms of association [14].

To be sure, much economic activity occurring within these multinational groups remains localized. For instance, such groups often include subsidiaries that produce goods for sale exclusively in local markets. But the defining characteristic of the multinational enterprise is a form of co-ordinative capacity that enables more fluid transnational activity [15]. Indeed, the closest thing the Organisation for Economic Cooperation and Development (OECD) offers as a definition of the multinational enterprise focuses on precisely that characteristic: "[Multinational enterprises] usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways." [16] As one commentator observes, that crucial co-ordination function explains the manner in which multinational corporate groups have served as an engine for transnational economic activity:

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14. For a survey of legal forms, see P. Muchlinski, *Multinational Enterprises and the Law* (2nd ed., 2007), at 51-77.

15. J. Ruggie, "Reconstituting the Global Public Domain – Issues, Actors, and Practices", 10 *European Journal of International Relations* 499 (2004), at 503 ("[F]irms have created a new transnational world of transaction flows that did not exist previously, and they have developed and instituted novel management systems for themselves").

16. OECD Guidelines for Multinational Enterprises, 2011 edition (2011), 17.

> "MNEs differ [from uninational companies] in their capacity to locate productive facilities across national borders, to exploit local factor inputs thereby, to trade across frontiers in factor inputs between affiliates, to exploit their know-how in foreign markets without losing control over it, and to organize their managerial structure globally according to the most suitable mix of divisional lines of authority. These factors permit MNEs to affect the international allocation of productive resources . . ." [17]

Because multinational enterprises operate across national borders, their structures challenge the regulatory capacity of any individual State. Such enterprises take advantage of the legal autonomy of their constituent parts – individual corporations or associations, each liable only to the extent of its own capital. That autonomy enables enterprise groups to conduct their operations on a global scale, but to limit the liability of any single entity within the group, as well as the liability of the group as a whole [18]. The structure of such enterprises also reduces their exposure to litigation, since most legal systems impose various limits on the jurisdiction of their courts over non-domiciliaries.

2. The transnational nature of economic activity

As has been evident for some time, markets in goods, services, and capital operate largely beyond the confines of individual States. Recent statistics on foreign direct investment and international trade flows alone signal the extraordinary transformation of business activity in this regard [19].

In considering the transnationalization of economic activity, it is important to emphasize that it involves more than simply an increasing number of transactions involving parties in multiple countries. Many such transactions – such as a sale of goods from a seller in one country to a buyer in another – are not particularly hard to regulate. Rather, this transnationalization involves increasingly more complex forms of transnational activity that generate economic and legal interdependencies across countries.

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17. P. Muchlinski, *Multinational Enterprises and the Law* (2nd ed., 2007), at 8.
18. See L. Backer, "Multinational Corporations as Objects and Sources of Transnational Regulation", 14 *ILSA Journal of International and Comparative Law* 499 (2008), at 504-505.
19. See United Nations Conference on Trade and Development, World Investment Report 2017.

Consider for instance the activities of a price-fixing cartel, in which companies from different countries enter into pricing arrangements that artificially elevate the price of their goods in markets around the world. At one level, this seems like a relatively straightforward type of cross-border problem; it could be characterized simply as an aggregation of separate, localized harms. On that view, each affected country would exercise its regulatory authority to address the harm caused by overcharges in its own market. Yet if the goods in question are fungible, then it is the global aspect of the cartel's strategy that makes it successful. The price-fixing must take place in all markets; otherwise, it could be avoided through arbitrage. Under these circumstances, the deterrence interest of any single State cannot be measured by the cartel's local impact alone [20].

In the discussion that follows, references to the transnational nature of economic activity are intended to capture not only the increasing quantity but also the increasing complexity of cross-border transactions.

C. Deterritorialization

To take a somewhat frivolous but very clear example of the phenomenon of deterritorialization, consider online gambling. A typical case in this area [21] involves a corporation that establishes a wholly-owned subsidiary in an offshore location. It installs servers there that it uses to run a web-based gambling operation. Customers access the website from their own home locations, but pay all debts with money that must be held in an offshore bank account. The website asks visitors for their address, and warns that residents of areas where gambling is prohibited may not use the website's services. The company does not verify the residency information that customers provide, however, and some of them do reside in areas where gambling is prohibited. This leads to disputes regarding the enforceability of their gambling debts, the authority of officials in the locations of customers' residence to prosecute the company for facilitating gambling, and the like.

In this scheme, where does the act of gambling take place? As some commentators have pointed out, cyberspace is not disconnected from

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20. These issues are explored in A. Klevorick and A. Sykes, "United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on *Empagran*", in *Antitrust Stories* (E. Fox and D. Crane, eds., 2007).

21. This illustration is based on *People* v. *World Interactive Gaming Corp.*, 714 NYS 2d 844 (NY Sup. 1999).

the physical world – it "is a medium through which people in real space in one jurisdiction communicate with people in real space in another jurisdiction" [22]. It relies on actual devices, such as servers and computer monitors, that have an actual location. But clearly the use of electronic means to gamble and to make payment weakens the relationship of the activity with any particular jurisdiction. This is true of ordinary internet-based sales as well.

For a more consequential example, consider a problem related to capital markets: identifying the location of an investor's interest in securities held by intermediaries. Historically, the settlement of a securities transaction required the physical delivery of a certificate to the buyer or its agent. As a result of technological advances, this system gave way to electronic clearance and settlement, and to an indirect holding system in which multiple levels of intermediaries are interposed between an issuer and its investors. In this system, a central securities depository (or its custodian) generally holds the physical certificates representing an issuer's securities. That issuer's investors neither hold physical certificates nor are registered as owners on the issuer's books. Rather, through the accounts they establish with an intermediary, the investors have an entitlement to a particular quantity of securities held by that intermediary in pools with the securities of other investors [23]. Where is that entitlement located? The answer to that question may dictate the law applicable to a security interest that the investor grants in its holdings to a creditor [24], or the treatment of those holdings if the investor files for bankruptcy. Yet the intangible nature of the entitlement, the fungibility of securities held on a pooled basis, and the potential involvement of multiple intermediaries located in multiple countries all serve to minimize the importance of any particular location at all.

D. Challenges in Regulating the Global Economy

Together, these trends pose significant challenges for regulators. Enterprise groups routinely utilize cross-border arrangements to take

22. J. Goldsmith, "The Internet and the Abiding Significance of Territorial Sovereignty", 5 *Indiana Journal of Global Legal Studies* 475 (1998).

23. For a general description of indirect holding systems, see Hague Conference on Private International Law, Preliminary Document No. 1 of November 2000, "The Law Applicable to Dispositions of Securities Held through Indirect Holding Systems" (2000) at 12-15.

24. This particular problem gave rise both to the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, concluded in 2006, and the UNIDROIT Convention on Substantive Rules for Intermediated Securities, adopted in 2009 (not yet in force).

advantage of the gaps among national regulatory regimes [25]. Recently, the implications of such arrangements on the effectiveness of tax regimes have drawn particular attention. Most systems of taxation are highly territorialized. As a result, simply by shifting assets to low-tax jurisdictions, multinational enterprises can reduce significantly the tax payable on income produced by those assets. This problem is especially pronounced in the technology sector, where corporate assets take the form primarily of intellectual property rights that can easily be assigned to subsidiaries in particular jurisdictions. Recent reports on the activities of a number of US-based technology companies indicate that they exploited the gaps between national tax systems in order effectively to eliminate taxation on their income prior to the point of repatriating it to the United States [26]. In a 2017 report, the European Commission referred directly to the impact of transnationalization and deterritorialization in undermining the effectiveness of tax regimes:

> "The current tax rules no longer fit the modern context where businesses rely heavily on hard-to-value intangible assets, data and automation, which facilitate online trading across borders with no physical presence. . . . This is an unsustainable situation in an increasingly globalised and digitally connected world, where ever more activity is moving into the digital space. Failure to address these situations will lead to more opportunities for tax avoidance, less tax revenues for public budgets, impact on social fairness, including through erosion of the social budgets, and it will destabilise the level playing field for businesses." [27]

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25. See generally V. Ho, "Theories of Corporate Groups: Corporate Identity Reconceived", 42 *Seton Hall Law Review* 879 (2011), at 935 ("Although the rise of multinational corporate groups has delinked corporations from ties to geographic and regulatory jurisdictions, international and domestic legal regimes remain territorially bounded. . . . Ultimately, the juxtaposition of geographically bounded sovereign nation-states as regulators and the emergence of business entities whose operations transcend such boundaries has weakened the power of any one state to regulate the corporation as a whole").

26. S. Bank, "The Globalization of Corporate Tax Reform", 40 *Pepperdine Law Review* 1307 (2013), at 1310-1312.

27. European Commission, *Communication from the Commission to the European Parliament and the Council: A Fair and Efficient Tax System in the European Union for the Digital Single Market*, COM(2017) 547, at 2.

E. Regulatory Responses to Globalization

In a number of ways, regulatory institutions have evolved to address the globalized economy. First, there have been some efforts to develop harmonized substantive standards, either through the enactment of international instruments that would displace national laws (including regional instruments) or through the convergence of national regulatory norms. Second, national regulators have worked to improve cross-system co-ordination. Their efforts include the negotiation of bilateral and multilateral agreements among regulatory agencies regarding co-operation and mutual assistance, as well as the development of transnational networks for sharing expertise and technical knowledge. Third, multinational enterprises have increasingly adopted soft-law standards and other modes of self-regulation. The following sections consider each of these developments in turn.

1. Harmonization of substantive law

The most effective way to regulate transnational economic activity, presumably, would be to develop a comprehensive regulatory regime equipped with compulsory jurisdiction that facilitates the resolution of disputes. In one area – trade law – States have constructed such a regime: the World Trade Organization. Efforts to develop global regulatory law in other sectors have been less successful. In some areas, however, harmonization on a smaller scale has been achieved through the development of regional legal orders, enforced by regional organizations.

The European Union is the most highly developed regional legal regime. The regulation of anti-competitive conduct there, for instance, has been greatly enhanced by the adoption of EU-wide competition law and the involvement of EU institutions in the enforcement of that law. Many other regions have taken significant steps toward the harmonization of regulatory law in recent years, including the Association of Southeast Asian Nations (ASEAN) and the Common Market for Eastern and Southern Africa (COMESA). This kind of reform takes a step toward freeing regulatory authority from the confines of territorialism – or at least it expands those confines from the national level to the regional level, thus shifting the scale of regulation to match more closely the scale of economic activity.

Gradual convergence of national substantive laws is another method of developing harmonized regulatory norms. Here, the areas

of anti-corruption law, insider trading, and hard-core price-fixing offer examples of progress [28]. Significantly, this sort of convergence is not accompanied by the development of supranational enforcement mechanisms. The implementation of regulatory law harmonized in this way can remain inconsistent across countries because of various differences in enforcement institutions and policies. Nevertheless, such convergence permits a shared understanding at least of the substantive norms that will be applied in the transnational setting.

2. Co-ordination among national regimes

In regulatory areas in which substantive laws continue to differ across legal systems, the effectiveness of domestic regimes in regulating transnational economic activity can be improved by enhancing co-operation and co-ordination among those regimes. Recent decades have brought tremendous progress in this kind of co-operative activity among public regulatory agencies. In all areas of economic regulation, including securities law, antitrust law, and banking regulation, the relevant regulatory agencies have formed transnational networks intended to support co-operation across jurisdictions [29]. In addition, many agencies have entered into bilateral agreements with their counterparts in other jurisdictions, providing for various forms of information sharing and other co-operation. For instance, the US Securities and Exchange Commission has entered into bilateral memoranda of understanding regarding enforcement co-operation with the securities authorities in twenty different countries [30], and the US Department of Justice has antitrust co-operation agreements in place with a dozen countries as well as the European Union [31]. In some areas, broader multilateral instruments are in place, such as the Multilateral Memorandum of Understanding concerning Consultation and Cooperation and the Exchange of Information developed by the International Organization of Securities Commissions [32]. When regulatory violations are also violations of

28. See also Backer, *supra* footnote 18, at 507 (giving as examples "harmonized substantive standards for labor relations, corruption, deployment of security forces, [and] taxation").

29. P.-H. Verdier, "Transnational Regulatory Networks and Their Limits", 34 *Yale Journal of International Law* 113 (2009).

30. Available at https://www.sec.gov/about/offices/oia.

31. Available at https://www.justice.gov/atr/antitrust-cooperation-agreements.

32. Available at https://www.iosco.org. In 2016, IOSCO adopted the Enhanced Multilateral Memorandum of Understanding.

criminal law, agencies have also been able to utilize treaties for mutual legal assistance in criminal matters.

All of these instruments provide for mutual assistance in the investigation of potential regulatory violations and in the enforcement of regulatory law. Some also include "positive comity" provisions pursuant to which regulators in a State affected by conduct occurring in the counterparty's jurisdiction can request that country to take enforcement action under its own laws. Chapter IV includes a more detailed examination of these instruments.

3. Self-regulation

A third aspect of regulatory adaptation to the increasingly transnational nature of economic activity is an increasing emphasis on self-regulation. Much of this self-regulation takes the form of soft-law regimes. In the area of business and human rights, for instance, multilateral institutions such as the OECD and the United Nations have adopted guidelines for the conduct of transnational business operations [33]. Many multinational enterprises also adhere to their own corporate codes of conduct. These regimes build on the recognition that nation-based regulation of transnational corporate activity leaves gaps – not only due to the trends outlined above, but also due to the more general move in the latter part of the twentieth century away from State intervention and toward market-based policies [34]. They seek to fill some of those gaps, particularly in the areas of labour regulation and environmental regulation, by imposing a self-monitoring role (sometimes accompanied by external monitoring) on the corporations themselves. Although scholars debate whether this form of self-regulation is effective, it has undoubtedly become a more common feature of the regulatory environment.

Applying these regimes to global value chains clearly illustrates the role of self-regulation in addressing the transnationalization and deterritorialization of economic activity. Global value chains are "borderless production systems" [35] used by multinational enterprises

33. OECD Guidelines for Multinational Enterprises, available at http://mneguidelines.oecd.org; United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, HR/PUB/11/04 (2011).

34. R. Jenkins, "Corporate Codes of Conduct: Self-Regulation in a Global Economy", United Nations Research Institute for Social Development (2001).

35. United Nations Conference on Trade and Development, 2013 World Investment Report.

to co-ordinate their supply and production processes, and may involve subsidiaries, affiliated companies, and/or non-affiliated companies linked by contractual arrangements. Because these participants are often scattered across multiple countries, traditional forms of regulation based on domestic law are not well suited to regulate activity within global value chains. In the 1990s, a number of different industries developed specific production standards governing relevant goods or services – including, for example, standards relating to the environmental and labour impacts of production. Companies active in those industries voluntarily agreed to implement the standards, and backed up their commitment with self-reporting and by participating in certification programmes and other forms of monitoring. Importantly, these standards applied not only to the ultimate retailer of goods and services, but to all activities and all participants throughout the relevant value chain. Because they avoided territorial limitations altogether, these private-sector initiatives helped to fill regulatory gaps among legal systems [36].

F. The Regulatory Mismatch

The foregoing discussion suggests that although regulatory systems have evolved quite substantially in response to the changing nature and scale of economic activity, that evolution has occurred largely within the traditional jurisdictional paradigm. Regulation in the cross-border arena has benefited from improved co-ordination of disparate national systems, but the sovereignty of the nation State remains the source of most regulatory power.

This mismatch between huge changes in the modes of economic activity and more modest changes in the modes of regulation has drawn significant scholarly attention. Much of this scholarship challenges the continuing viability of the Westphalian model of sovereignty, arguing that defining sovereignty as exclusive control over particular physical territory simply fails to capture the source and extent of governmental power today [37]. Some of it makes a more radical normative move, seeking to ground the concept of regulatory jurisdiction in an entirely different theoretical foundation – in the words of one writer, proposing

36. K. Nadvi, "Global Standards, Global Governance and the Organization of Global Value Chains", 8 *Journal of Economic Geography* 323 (2008).

37. See, e.g., A. Chayes and A. Chayes, *The New Sovereignty: Compliance with Regulatory Agreements* (1995); S. Krasner, *Sovereignty: Organized Hypocrisy* (1999); S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (2006).

to "conceptualize legal jurisdiction in terms of social interactions [among various regional, national, transnational, international, and cosmopolitan communities] that are fluid processes, not motionless demarcations frozen in time and space" [38]. Thus far, however, these more radical reconceptualizations of economic regulation remain academic.

In practice, the enforcement of regulatory law by individual States continues to generate significant conflict.

First, the harmonization of regulatory law, whether through substantive convergence or through the development of international or regional instruments, remains quite limited. That process encounters many political and technical barriers; moreover, countries continue to disagree, often fundamentally, about their regulatory goals relating to various kinds of economic activity. The result is frequent conflicts of substantive law, the topic of Chapter III.

Second, serious differences in vision persist regarding regulatory pathways. The enforcement of regulatory law in national courts in particular has been a source of significant international conflict – including conflicts of procedural law, the topic of Chapter IV.

Finally, the emergence and practices of regulatory hegemons generates resistance from other States. There are many ways in which an individual country might seek to impose its own regulatory choices on other systems. It could adopt regulatory legislation with a very broad geographic scope, drawing foreign actors or foreign conduct within its ambit. Its courts could adjudicate regulatory claims only tenuously connected with the forum State, and apply local law to those claims. Or the country might use its political power to promote the adoption of harmonized international standards modelled on its own laws. These sorts of practices generate significant political conflict, the topic of Chapter V.

G. The Consequences of Conflict

1. Over-regulation

The regulation of transnational economic activity by multiple institutions – regulatory institutions in multiple countries, multiple regu-

38. P. Berman, "The Globalization of Jurisdiction", 151 *University of Pennsylvania Law Review* 311 (2002), at 322. See also C. Ryngaert, "Territory in the Law of Jurisdiction: Imagining Alternatives", in M. Kuijer and W. Werner, eds., *Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law* (2017), 49-82.

latory institutions within a single country, or both – creates various forms of regulatory overlap. At the very least, participants in certain types of economic activity face the burden of complying with multiple regimes. Issuers with cross-listed securities must comply with more than one set of registration and disclosure requirements; participants in cross-border mergers must obtain clearance of their transaction in more than one system. This form of overlap imposes significant transaction costs on market participants, and involves inefficient duplication of effort by regulators. Moreover, regulation by multiple institutions may lead to over-deterrence of particular activity. This might take the form of duplicative and therefore excessive fines and penalties; it might also result from the obligation to comply with the most restrictive elements of each applicable regime [39]. Conflict across jurisdictions regarding optimal substantive and procedural norms limits progress toward uniform regulatory solutions, and thereby perpetuates these risks of over-regulation.

2. *Under-regulation*

The greater risk facing the global economy, however, is likely under-regulation. As the following chapters will demonstrate, when regulatory institutions face significant conflict with other countries – whether substantive, procedural, or political – they may choose to retreat from broad engagement with transnational activity. In particular, they may focus their attention on a relatively narrow set of "domestic" interests, defined in a way that minimizes or excludes shared interests in global economic welfare. Moreover, they may articulate those interests by reference to territorial linkages, thus leaving certain forms of transnational activity outside the reach of any enforcement regime.

This is not an argument against efforts to mitigate international conflict in economic regulation. It simply points out that too quick a retreat from conflict may reduce the overall level of enforcement activity at a time when the losses caused by unlawful economic activity are growing. In an impact assessment issued in connection with one of its reform proposals, the European Commission estimated that the cost to consumers and companies within the European Union from hardcore cartels alone amounted to, annually, at least 25 billion

39. See A. Guzman, "The Case for International Antitrust", 22 *Berkeley Journal of International Law* 355 (2004), at 360.

euros [40]. The European Parliamentary Research Service estimates that corporate tax avoidance costs the European Union between 50 and 70 billion euros annually [41]. The World Bank estimates that approximately US$1 trillion are paid out in bribes worldwide each year [42]. This estimate does not include amounts lost through other forms of corruption, such as embezzlement of public funds, nor does it account for the significant losses in private sector development and economic growth that countries suffer as a result of high levels of corruption [43]. A recent survey projected that global losses caused by fraud, including sales fraud and accounting fraud, exceed trillions of dollars annually [44]. Plainly, addressing harms of this magnitude requires the international community to mobilize all available regulatory resources.

H. The Role of Private Enforcement

Private enforcement offers one possible solution to the resource challenges described above. In general, the primary advantages of private enforcement are to

> "(1) multiply resources devoted to prosecuting enforcement actions; (2) shift the costs of regulation off of governmental budgets and onto the private sector; [and] (3) take advantage of private information to detect violations" [45].

In addition, they avoid some of the risks of under-enforcement produced by agency capture.

However, the design of private enforcement regimes is complicated and controversial. Most legal regimes have historically maintained a clear divide between the public regulatory function and ordinary civil litigation. That divide is reflected in a number of features common to

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40. European Commission, Commission Staff Working Document, Impact Assessment Report on Damages actions for breach of the EU antitrust rules, COM(2013) 404, 6 November 2013, at paras. 64 and 65.

41. European Parliamentary Research Service, "Study, Bringing Transparency, Coordination and Convergence to Corporate Tax Policies in the European Union", September 2015.

42. World Bank, "Combating Corruption" (Brief) (26 September 2017), available at www.worldbank.org/en/topic/governance/brief/anti-corruption.

43. Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann.

44. Association of Certified Fraud Examiners, Report to the Nations: 2018 Global Study on Occupational Fraud and Abuse.

45. S. Burbank, S. Farhang and H. Kritzer, "Private Enforcement", 17 *Lewis & Clark Law Review* 637 (2013), at 662.

systems outside the United States. First, many countries simply reserve certain forms of economic regulation for their public agencies. In such systems, no private cause of action can be asserted by individuals or companies harmed by another's unlawful conduct. Public agencies exclusively conduct enforcement proceedings, and any resulting fines are generally paid directly to the Government. Second, in situations where regulations do include a private cause of action, the function of that cause of action is explicitly compensatory rather than regulatory. For instance, some such laws permit private actions only after the conclusion of successful public investigations. Others require the exhaustion of public administrative remedies before a private cause of action may be asserted. And outside the United States, virtually all such rights are limited to compensatory damages only, and carry no special incentives such as multiple damages or cost-shifting.

In the United States, by contrast, ordinary civil litigation includes an explicitly regulatory dimension. This regulatory aspect can be seen most clearly in various statutes authorizing plaintiffs to serve as "private attorneys general". In areas of regulation including antitrust, securities regulation, and anti-racketeering, Congress has expressly created a cause of action for persons harmed by unlawful conduct [46]. In some cases, furthermore, it has incentivized plaintiffs to assert their rights by providing for treble damages awards and fee-shifting provisions [47]. One goal of such provisions is to facilitate access to compensation for those injured by unlawful conduct. Another, though, is to incentivize private litigation as a supplement to the Government's enforcement resources, thereby deterring unlawful behaviour [48]. In the case first using the label "private attorney general", the Second Circuit Court of Appeals explained that just as Congress could authorize the Attorney General to sue on behalf of the public, so too, by statute, could it authorize suits by non-official persons "to vindicate the public interest" [49].

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46. See, e.g., 15 USC, § 77 (private cause of action to sue for unlawful registration statements under the securities laws); 15 USC, § 15(a) (private cause of action to sue for anti-competitive conduct under the antitrust laws); 18 USC, § 1964(c) (private cause of action under RICO). Other regulatory statutes have been interpreted to include implied rights of action. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 US 723 (1975) (implied right of action under the anti-fraud provision of US securities law).

47. See, e.g., 15 USC, § 15(a) (treble damages and fee-shifting under antitrust law); 18 USC, § 1964(c) (treble damages and fee-shifting under RICO).

48. See *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 US 143, 151 (1987) (discussing statutes that "bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate").

49. *Assoc. Indus.* v. *Ickes*, 134 F. 2d 694, 704 (2d Cir. 1943).

These fundamental philosophical differences have led to a significant cultural divide among legal systems regarding the desirability of private enforcement regimes. In addition, as we will see, regulatory litigation can cause significant conflict in the transnational arena. Nevertheless, its potential advantages merit investigation. Therefore, the following analysis emphasizes an examination of the special role that private enforcement plays in cross-border regulation, and considers whether – along with tools for co-operation and co-ordination in the public realm – it might play a role in increasing the effectiveness of transnational economic regulation.

CHAPTER III

SUBSTANTIVE CONFLICTS IN TRANSNATIONAL ECONOMIC REGULATION

A. Introduction

The laws regulating economic activity establish the objectives, mechanisms, and limits of government intervention in the private business arrangements of corporations and individuals. In so doing, these laws give shape to a particular vision of economic life within the borders of the enacting State. They reflect and implement local political decisions regarding the relationship between the State and the market, and are enacted against the backdrop of specific social, economic, business, and cultural conditions. Moreover, they reflect the power and priorities of local interest groups. It is therefore not surprising to find significant substantive differences in the regulatory law of different legal systems.

During the era in which law was believed to be strictly territorial [50], the lack of uniformity in the regulatory law of different States was of little consequence. Each State had jurisdiction to regulate all conduct occurring within its borders – and *only* conduct occurring within its borders [51]. As a result, a State's claim of regulatory authority rarely came into conflict with the claim of any other State. This situation changed over the course of the twentieth century as the doctrine of effects-based jurisdiction gained acceptance. That doctrine recognized that, in the increasingly globalized economy, the regulatory law of any individual country would simply fail to achieve its purpose if its application were restricted to conduct that took place within that country [52]. To take the simplest kind of example, consider two US companies, both of which sell goods in Japan. If those companies were to collude with each other to fix the price of those goods, harming consumers in Japan, surely Japanese regulators must be able to prosecute that conduct under

50. See *supra*, Chapter II.A.

51. J. Story, *Commentaries on the Conflict of Law* (1834) (Arno Press ed., 1972), at 19-21. Consistent with the prevailing view at the time, Story also recognized a Sttate's authority to regulate its own nationals abroad.

52. R. Avi-Yonah, "National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization", 42 *Columbia Journal of Transnational Law* 10 (2003).

Japanese competition law, regardless of where the collusion occurred. Otherwise that law would be powerless to regulate even conditions within the Japanese market [53]. Or consider international data flows. As a recent analysis notes, "From the EU perspective, permitting an abuse of European citizens' personal information *outside* of Europe would make a mockery of decades of work to create high levels of privacy *inside* Europe." [54]

Relying on the effects doctrine, States began to apply their regulatory law to foreign conduct that caused harm within their borders. This framework generated frequent regulatory overlaps, since multiple countries often could, and did, assert regulatory authority over the same cross-border business activity. In virtually every substantive area – including competition, securities regulation, consumer protection, and financial regulation – one can trace an increase in this type of effects-based regulation. With the increasing internationalization of markets for goods, services, and capital, conflicts of substantive regulatory law became common.

This chapter explores the consequences of substantive conflict in the regulation of cross-border economic activity, and examines various tools that States use to minimize it. First, though, it considers an alternative: harmonized economic regulation. In a very distant future, one might imagine a world market, governed by world regulatory law enforced by multilateral regulatory institutions. That ideal, if it is in fact an ideal, seems distant indeed. But significant progress has been made toward the harmonization of regulatory law on a number of fronts. These include the formation (in discrete subject-matter areas) of international law; the expansion of regional law; and various forms of substantive convergence.

B. Progress toward the Harmonization of Regulatory Law

1. Internationalization

In some areas of regulation, there have been efforts to develop binding multilateral instruments that would unify the relevant substantive law

53. See Case 89/85, 1988 ECR 5193, 4 CMLR 901 (1988) *(Wood Pulp)* ("If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented").

54. P. Schwartz and K.-N. Peifer, "Transatlantic Data Privacy Law", 106 *Georgetown Law Journal* 158 (2017).

in member States. Such efforts have generally failed. Over the past 75 years or so, for instance, there have been several unsuccessful attempts to develop international competition law [55]. The latest of these occurred in the mid-1990s, when the European Union spearheaded a movement to incorporate an international competition regime into the World Trade Organization framework. The proposed system would have included not only uniform rules but also a global enforcement authority. The movement failed to attract sufficient support, partly on the basis of concerns that the substantive norms ultimately negotiated would disadvantage emerging economies.

Other multilateral initiatives seek to develop not directly-applicable norms regulating particular issues, but rather regulatory frameworks within which States agree to operate. A successful initiative of this type – also within the WTO – focused on the regulation of intellectual property rights. During the Uruguay Round, from 1986 to 1994, WTO member States negotiated the Agreement on Trade-Related Aspects of Intellectual Property Rights [56]. This agreement establishes certain minimum standards for the protection of different forms of intellectual property, but otherwise leaves individual States latitude in enacting national law [57]. All WTO member States are required to ratify TRIPs, thus ensuring its application virtually worldwide. This form of international agreement operates not by shifting regulation to the international plane, but rather by promoting (indeed, requiring) substantive convergence among legal regimes.

2. Regionalization

One movement propelling significant harmonization of regulatory law is regional integration. Beginning in the second half of the twentieth century, neighbouring countries in many areas of the world have formed regional associations that possess various degrees of lawmaking authority. These associations are formed for different purposes and with different objectives [58]. At least initially, many are constituted simply to

55. J. Nakagawa, *International Harmonization of Economic Regulation* (transl. J. Bloch and T. Cannon, 2011), at 188-194.

56. Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 *International Legal Materials* 81 (1994).

57. See generally G. Dinwoodie and R. Dreyfuss, "TRIPS and the Dynamics of Intellectual Property Lawmaking", 36 *Case Western Reserve Journal of International Law* 95 (2005).

58. For a typology of different objectives and classification of particular regions, see C. Closa and L. Casini, *Comparative Regional Integration: Governance and Legal Models* (2016), at 12-19.

create a trade bloc, for example. Others may seek to improve security and political stability within the relevant region. Consistent with their particular purposes, these regions enact legal instruments in a range of areas including trade, investment, competition, and anti-corruption.

One such association, the European Union, is often pointed to as proof of the role that regionalization can play in forming uniform regulatory law. Indeed, the European Union has generated a vast amount of uniform law governing economic activity within the common market [59]. In some substantive areas, the EU regime has more or less completely harmonized the laws of member States. This is true, for example, in the area of competition law. Competition law provisions included in the Treaty on the Functioning of the European Union are binding on, and have direct effect within, all member States. A suite of regulations, likewise binding and directly applicable in all member States, establish additional rules governing various forms of anticompetitive conduct. Member States have also vested the European Commission with authority to enforce EU competition law. As a result, competition law and policy within the European Union have been largely harmonized [60].

This harmonization is not complete, since the national competition law of member States still applies to conduct or transactions lacking a community dimension. However, there has been significant convergence of those national laws. That convergence was achieved in part by requiring new member States to enact competition laws, along with other forms of economic regulation, as a condition of accession to the European Union. Thus, as a result of both regional law and convergence among national systems, substantive norms of competition law are largely uniform within Europe.

As this example demonstrates, the enactment of regional law governing a particular type of activity eliminates substantive conflicts of laws in that area, at least among States within the region. Moreover, regionalization might be seen as a way-station to full global harmonization – a model for how to pool sovereignty and achieve consensus on particular substantive norms that could then be used at the global level. However, there are significant limits to the role that regionalization can play in the formation of harmonized regulatory law.

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59. For a recent study of harmonization in the European Union, see L. Azoulai, "The Complex Weave of Harmonization", in D. Chalmers and A. Arnull (eds.), *The Oxford Handbook of European Union Law* (2015).

60. See generally D. Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (2001), at 392-416.

First, as noted, regional associations have different purposes and different structures. Accordingly, they pursue regulatory harmonization to different extents. The European Union lies at the far end of the spectrum. Originally conceived as a means to secure peace and stability in post-war Europe, it has long since evolved into a highly integrated economic market. Other regional associations are far less fully integrated. Many were formed with the more limited purpose of creating a trade bloc – in order either to facilitate intra-regional trade, or to enhance the position of the region's member States in the global arena. In these areas, the process of regionalization may focus on trade agreements alone, without encompassing broader financial and economic regulatory frameworks. Where regional lawmaking does go beyond trade instruments, it may extend only to closely related areas. For instance, because private restraints of competition undermine free trade, competition laws are often enacted in conjunction with trade liberalization [61]. Many regional organizations apart from the European Union have such regimes in place, including the Association of Southeast Asian Nations (ASEAN), the Caribbean Community (CARICOM), the Common Market for Eastern and Southern Africa (COMESA), and the Southern Common Market (MERCOSUR) [62]. However, fewer regional instruments have been enacted in regulatory areas less tightly linked to the goal of trade liberalization. Securities regulation, for example, remains almost exclusively in the purview of individual States.

Second, in most regions, member States are reluctant to transfer significant sovereign authority to a regional lawmaker. This reluctance may stem from a variety of different sources, including political and cultural heterogeneity among States within the region [63] and the desire of post-colonial States to defend their own newly-won sovereignty [64]. Whatever the reason, it leads many regional organizations to adopt legal structures whose objective is convergence and co-ordination rather than top-down harmonization of law. A comparison of regional competition

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61. J. Basedow, "International Antitrust: From Extraterritorial Application to Harmonization", 60 *Louisiana Law Review* 1037 (2000), at 1037-1038.

62. See discussion of regional instruments in M. Dabbah, *International and Comparative Competition Law* (2010), at 366-408.

63. R. W. Hu, "China, the US and Regional Institution Building", in *East Asia, in East Asian Economic Integration: Law, Trade and Finance* (Buckley *et al.*, eds., 2011), at 10.

64. D. O'Brien, "CARICOM: Regional Integration in a Post-Colonial World", 17 *European Law Journal* 630 (2011).

law regimes illustrates this point. Unlike EU competition law, many regional instruments are not directly binding on the region's States; rather, they take the form of model laws or guidelines that must be implemented at the national level. Some of these explicitly contemplate variations among States. ASEAN's 2010 Regional Guidelines on Competition Policy of the Association of Southeast Asian Nations, for example, are positioned as a general framework for member States to consider as they develop antitrust policies consistent with their own particular legal, economic, and social contexts.

Third, some regional law is designed to apply only to cross-border activity. In such cases, uniform regional law may exist side by side with disparate national regimes that continue to regulate purely domestic activity.

Finally, some commentators have expressed the concern that regionalization may create obstacles to worldwide harmonization. For instance, the emergence of regional law and lawmaking bodies can complicate the technical aspects of international lawmaking [65]. Additionally, the coalescence of multiple national laws into a unified regional regime may harden differences between that regime and laws in other States or regions. This is particularly true when one objective in developing the regional regime is to challenge a dominant regulatory paradigm elsewhere [66].

3. Substantive convergence

Finally, in some areas of economic regulation there has been significant convergence of national legal regimes – in other words, national laws have not been displaced by regional or international instruments, but the rules governing particular issues have over time come to be very similar across countries. In the area of competition regulation, for instance, while there are many issues on which there is no real consensus across countries, nearly all systems prohibit hard-core price fixing. In the area of securities regulation, similarly, there are many issues on which legal systems disagree – including the level of public disclosure that corporate issuers must provide, and the extent to which

65. J. Basedow, "Worldwide Harmonisation of Private Law and Regional Economic Integration – General Report", 8 *Uniform Law Review* 31 (2003).

66. See generally M. Kahler, "Regional Challenges to Global Governance", in *Global Order and the New Regionalism*, Council on Foreign Relations Discussion Paper Series on Global and Regional Governance (September 2016), at 5-6.

individual actors may be liable for certain types of securities fraud. But there has been significant convergence over time toward a norm prohibiting insider trading, which is now enforced in jurisdictions across Europe and Asia as well as in North America [67].

Many different entities, using a variety of rule-making processes, promote the convergence of regulatory law.

(a) *Convergence through multilateral initiatives*

A number of multilateral organizations support the development of international conventions on particular topics for ratification by member States. The OECD, for example, is an active player in this kind of lawmaking. Its anti-bribery convention [68] has been adopted by over 40 States, including OECD member countries as well as some non-members. The convention requires signatories to criminalize the bribery of foreign public officials in the course of international business transactions, thus introducing a shared norm regulating such behaviour. Similarly, the International Labour Organization has developed a number of conventions protecting fundamental rights of employees, several of which have been widely ratified [69]. They have helped promote convergence around particular aspects of labour regulation, including in the area of anti-discrimination.

These organizations also generate non-binding recommendations and statements of best practice that support convergence in particular regulatory areas. In 1999, for instance, the OECD published a recommendation concerning cartels stating that "member countries should ensure that their competition laws effectively halt and deter hard core cartels" as defined therein [70]. While these instruments do not affirmatively require member States to adopt the recommended norms, they are generally followed. The organizations also deploy mechanisms such as peer review to promote compliance with their recommendations.

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67. D. Bach and A. Newman, "Transgovernmental Networks and Domestic Policy Convergence: Evidence from Insider Trading Regulation", 64 *International Organization* 506 (2010).

68. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 *International Legal Materials* (1998), 1.

69. See, e.g., ILO, Convention concerning Discrimination in Respect of Employment and Occupation (entry into force 1960); ILO, Convention concerning Minimum Age for Admission to Employment (entry into force 1976).

70. OECD, Recommendation of the Council concerning Effective Action against Hard Core Cartels, 25 March 1998, C(98)35/FINAL, at I.A.1.

In addition, a number of international organizations produce model laws whose widespread adoption by individual countries would lead to legal unification. These include the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT), both of which are active in modernizing and harmonizing the law governing international business. Although both organizations focus particularly on commercial law, their work programmes sometimes include related topics in more regulatory areas. In 2009, for instance, UNIDROIT adopted a convention laying out rules to govern accounts in intermediated securities [71].

(b) *Convergence through initiatives within regulatory networks*

National supervisory and regulatory agencies in many substantive areas have formed transnational networks to improve co-operation and co-ordination in their particular spheres of activity [72]. Their primary focus is on improving cross-border enforcement, a topic addressed in Chapter IV. However, they also promote the convergence of regulatory law.

In the field of securities regulation, the leading transnational network is the International Organization of Securities Commissions (IOSCO). Its members include over 120 national securities regulators, along with another 80 participants in securities markets, such as stock exchanges and regional financial organizations. The organization's stated goal is

> "to cooperate in developing, implementing and promoting adherence to internationally recognized and consistent standards of regulation, oversight and enforcement in order to protect investors, maintain fair, efficient and transparent markets, and seek to address systemic risks" [73].

In the field of competition regulation there are a number of prominent networks, including the International Competition Network, which has grown to include members from over 100 jurisdictions, as well as the European Competition Network [74]. Examples in other areas of regulation

71. UNIDROIT Convention on Substantive Rules for Intermediated Securities (not yet in force).

72. See generally A.-M. Slaughter, *A New World Order* (2004); K. Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", 43 *Virginia Journal of International Law* 1 (2002).

73. IOSCO, Objectives, available at http://www.iosco.org/about.

74. I. Maher and A. Papadopoulos, "Competition Agency Networks around the World", in *Research Handbook on International Competition Law* 60 (A. Ezrachi, ed.) (2012).

include the International Association of Insurance Supervisors, the Basel Committee on Banking Supervision, and the International Network for Environmental Compliance and Enforcement.

One aspect of these networks' work programmes is to promote substantive convergence of national laws. IOSCO's mission, for instance, includes the objective to become "the global standard setter for the securities sector" [75]. Consistent with that objective, it has published a set of general, high-level principles of securities regulation intended to serve as a framework for nascent securities regimes [76]. It is also active in promoting co-ordinated action on high-priority issues. In 2013, for example, the organization issued a policy document addressing certain particularly complex financial instruments, and generated a series of regulatory options for individual agencies to consider in crafting their own domestic rules regarding those instruments [77]. In a similar manner, the International Competition Network has developed various guidelines setting out best practices in various areas of competition regulation [78].

The networks boost implementation of these standards and best practices by providing various forms of technical assistance. For instance, IOSCO publishes technical guidance for domestic regulators in specific areas of capital market regulation. In addition, working through its Assessment Committee, the network conducts country reviews that assist local agencies, particularly in developing economies, with the process of legal reform. The International Competition Network likewise maintains an Advocacy and Implementation Network that monitors and supports competition law developments in its member agencies. In these ways, although the networks do not generate mandatory principles of any kind, they contribute significantly to the harmonization of substantive law across countries.

(c) *Through international development practices*

Finally, international economic development programmes have also contributed to convergence among regulatory laws in certain areas.

75. IOSCO, Objectives, available at http://www.iosco.org/about.

76. IOSCO, Objectives and Principles of Securities Regulation (last revised 2017), available at http://www.iosco.org/about.

77. The Board of the International Organization of Securities Commissions, Regulation of Retail Structured Products, Consultation Report, CR05/13, April 2013, available at http://www.iosco.org/library/pubdocs.

78. H. Hollman and W. Kovacic, "The International Competition Network: Its Past, Current and Future Role", 20 *Minnesota Journal of International Law* 274 (2011).

In certain circumstances convergence around a particular regulatory approach is more or less required. For instance, the International Monetary Fund has sometimes required countries seeking international loan assistance to enact competition laws as a condition of that support [79]. Similarly, the World Trade Organization (WTO) requires countries to make commitments regarding the implementation and enforcement of antitrust laws as part of the accession process. Because the laws enacted in these circumstances are intended to achieve economic liberalization objectives, they are of a particular stripe, and thus converge around a particular model. Another driver of convergence related to development programmes is the technical assistance framework those programmes utilize. Both the World Bank and the United Nations Conference on Trade and Development (UNCTAD), for example, offer assistance and advisory support to countries enacting structural economic reform. That too leads to convergence around particular models of regulation.

(d) *Assessing the extent of convergence*

The degree of convergence achieved by such mechanisms does not eliminate substantive conflicts of law entirely, even in the areas covered. Many instruments of the type described above articulate relatively open-ended norms rather than specific rules, leaving room for variation among States. The OECD's recent recommendation regarding consumer protection in the area of e-commerce [80], for instance, includes a number of general principles relating to business practices, such as "[b]usinesses should not use unfair contract terms". The OECD recommends that States implement those principles within their own policy frameworks. This open-endedness characterizes some treaties as well. The ILO's employment discrimination convention, for example, requires member States "to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment in occupation" [81]. Obviously, States may translate such principles into their own laws in different ways, allowing substantive

79. For a critical review of the history of these sorts of structural conditions, see A. Kentikelenis, T. Stubbs and L. King, "IMF Conditionality and Development Policy Space, 1985-2014", 23 *Review of International Political Economy* 543 (2016).

80. OECD, Recommendation of the Council on Consumer Protection in E-commerce, 24 March 2016, C(2016)13.

81. ILO, Convention concerning Discrimination in Respect of Employment and Occupation, Art. 2.

conflicts to persist. Moreover, some of the relevant instruments address only cross-border activity, and therefore do not harmonize national law overall. UNCITRAL's model law on insolvency, for instance, addresses only cross-border bankruptcies, and by its own terms does not seek to unify substantive insolvency law [82]. Finally, of course, not all of the instruments designed to promote unification are widely implemented.

C. Consequences of Substantive Conflict

Overall, the developments described above have yielded only limited progress toward harmonized economic law. National law remains the primary source of regulation, and, as a result, conflicts of laws remain common.

Some regulatory conflicts involve a direct collision of different substantive norms: in other words, multiple States apply their laws to regulate a particular transaction or occurrence, and those laws do not agree [83]. Some conflicts, by contrast, involve not a direct collision of substantive norms but what might be better described as a conflict of jurisdictional authority. For instance, assume a situation in which State A's law prohibits certain conduct, while State B has enacted no law governing the particular issue area. State A's application of its law to conduct occurring within the territory of State B would not create a direct conflict of different substantive norms. Nevertheless, it might generate questions regarding the geographic scope of State A's law (a question of statutory construction), or the legitimacy of State A's action in regulating persons or activity in State B (a question of the customary international law limits on prescriptive jurisdiction).

Regulatory conflicts are common in the public enforcement domain. As discussed above, effects-based jurisdiction supports the application of domestic law to foreign activity that affects the regulating State's markets. Since economic activity often affects multiple markets, agencies in more than one country frequently regulate the same conduct or transaction simultaneously, each applying its own domestic law. Such conflicts occur in the context of private enforcement as well. Many regulatory laws create a private cause of action for individuals harmed by prohibited conduct. Again on the basis of effects jurisdiction, a plaintiff in one State might initiate a claim under local law for harm

82. UNCITRAL Model Law on Cross-Border Insolvency (1997).

83. In some cases, one State prohibits what another State explicitly approves; in others, one State prohibits what another requires.

caused by foreign conduct. In a situation in which multiple legal systems recognize causes of action for particular wrongs, a defendant might face litigation in multiple countries, under different laws, for harm arising from a single course of conduct. Such conflicts affect both regulators and market participants in a number of ways.

1. Increased transaction costs

The most direct consequence of substantive conflicts is an increase in the transaction costs borne by market participants. These take a variety of forms.

(a) *Compliance costs*

Substantive conflict increases the cost of regulatory compliance for entities engaged in cross-border business activity. Take for example the supervision of a company whose securities are publicly listed in multiple markets. That company must comply with ongoing reporting requirements. Because that reporting is supervised at the national rather than international level, duplication of reports is inevitable: the company will have to provide information to multiple regulatory agencies. But when the applicable requirements differ in substance, that burden is far greater. The company will have to deal with more than one set of disclosure requirements, accounting standards, and so forth in preparing its reports. As a 2014 IOSCO report stated, cross-listed companies face "duplicative, inconsistent and conflicting requirements which lead to significant compliance burdens and unnecessary barriers to cross-border trading and investment" [84].

These sorts of costs are imposed not only in connection with ongoing supervisory processes but also in connection with individual cross-border transactions. For instance, companies that seek to merge are subject to competition regulation in each market in which their goods or services are sold. As a practical matter, this involves obtaining pre-merger clearance in all jurisdictions where their revenues exceed certain monetary thresholds. When the review process is conducted according to different rules in different States, transaction costs increase significantly.

In some areas of regulation, substantive discrepancies among legal systems create compliance burdens that affect companies' operations

84. IOSCO Task Force on Cross-Border Regulation, Consultation Report (2014), 43.

in more pervasive ways. On this point, one of the clearest examples in recent years is found in the area of data protection. The growth in Internet services and the decentralization of information processing have spurred a dramatic increase in the flow of personal information across national borders [85]. But different countries have adopted very different approaches to the question of data protection, with the result that rules on matters such as data processing, data storage, and the protection of personal information vary significantly across jurisdictions. These rules generally apply to companies regardless of their location, to the extent that they do business with residents of the enacting State. For example, the European Union, which for over 20 years has implemented a policy of expansive protection under the laws of individual member States, recently enacted the General Data Protection Regulation (GDPR) [86]. This regulation, which entered into force in 2018, fully harmonizes the data protection framework within the common market. It also explicitly applies to the processing of EU residents' personal data by businesses based outside the European Union [87].

As a result, a multinational enterprise that sells goods or services within the European market must maintain systems that comply with the GDPR as well as data protection law in its own jurisdiction. In the wake of the GDPR's enactment, many companies indicated that they would need to redesign their systems for storing and processing the personal data of their customers, often at significant expense. The regulation also includes requirements that will affect companies' ongoing business practices, such as a mandate to report most breaches of personal data within a specific period of time [88]. In these ways, the applicability of multiple different regulatory regimes can impose operational as well as financial costs on market participants.

(b) *Transaction costs for consumers*

Substantive differences in the regulatory regimes of different States also impose transaction costs on market participants other than the regulated entities themselves. For instance, companies must comply

85. J. Reidenberg, "International Data Privacy Rules", 52 *Stanford Law Review* 1315 (2000).

86. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ (L 119/1).

87. See GDPR, Art. 3 (Territorial scope) and Chapter V (Transfers of personal data to third countries or international organizations).

88. See GDPR, Art. 33.

with ongoing reporting and disclosure obligations in the markets where they list their securities. Those obligations differ from country to country. As a result, it is difficult for investors to compare the financial condition and results of operations of companies listed in different markets.

In addition, substantive differences may lead to the fragmentation of markets in a way that reduces overall choice for consumers. Consider the situation of a bidder seeking to acquire a company whose shareholders are located in multiple jurisdictions. That bidder may conclude that tender offers within a subset of those jurisdictions will yield sufficient shares to complete the transaction. If so, its incentive is simply to exclude shareholders in other jurisdictions rather than incur the cost of launching additional tender offers [89]. The result is that shareholders in the excluded systems are either unable to obtain any portion of the bid premium, or must themselves bear the costs of participating by selling their shares outside the framework of the tender offer [90]. Likewise, a vendor of digital services might withdraw from some geographic markets rather than face the necessity of complying with overlapping data protection regimes. As a result, consumers in those markets would either be unable to obtain those services or bear increased transaction costs in procuring them.

2. *Uncertainty caused by inconsistent regulatory outcomes*

In addition to increasing regulatory burden, differences among substantive legal regimes can of course yield different regulatory outcomes. In other words, a particular cross-border transaction or course of conduct might be considered lawful in one jurisdiction but unlawful in another. The topic of merger regulation provides a good illustration of resulting challenges.

Among mature competition regimes, there has been significant convergence of the legal standards governing mergers. Nevertheless,

89. See E. Greene, A. Curran and D. Christman, "Toward a Cohesive International Approach to Cross-Border Takeover Regulation", 51 *University of Miami Law Review* 823 (1997), at 825-826.

90. Some regulators have attempted to address these adverse effects through unilateral rulemaking. In 1999, for example, the US Securities and Exchange Commission adopted rules intending to discourage the exclusion of US shareholders, in part by providing exemptions from local requirements in certain categories of takeovers. Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Release No. 33-7759, 34-42054 (22 October 1999) (amended 2008).

certain areas of difference remain [91]. Some of these relate to substantive issues – for instance, the extent to which adverse effects on competitors are taken into account, or the method by which the relevant market is defined. Some are more procedural – for example, the standard of proof that an agency must meet in putting forward evidence of a likely anti-competitive effect. Thus, the potential for conflict in cross-border merger review is obvious: the lack of uniform competition laws means that regulators in the relevant States may apply different standards to proposed combinations. As a result, a merger that is approved in one or more jurisdictions may be blocked, or subjected to certain conditions, in others.

Two instances of overlapping merger review in the United States and the European Union are typically used to illustrate this particular conflict of laws. The first was a proposed combination of Boeing and McDonnell-Douglas, two US airplane manufacturers; the second likewise involved two US companies, General Electric (a major producer of jet engines) and Honeywell (a leader in aerospace components). In each case, the proposed merger would have had significant impact on the relevant market both in the United States and in Europe. As a result, both US and European regulators had jurisdiction to review the proposed transaction. In each case, US authorities, applying US antitrust law, cleared the merger, while European regulators, applying the different substantive standard set forth in European competition law, did not [92]. As noted, there has been significant substantive convergence in merger regulation, and it is rare particularly for the United States and European Union authorities to come to such divergent conclusions. Nevertheless, the lack of harmonized substantive norms is a factor in these cases, and they therefore provide a helpful illustration of the sorts of adverse consequences that flow from the resulting conflicts of law.

To some extent, of course, these sorts of outcome differences are simply the inevitable result of effects-based jurisdiction. Each State has the authority to decide whether and under what conditions to permit economic activity affecting its markets, and the regulatory actions

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91. D. Sokol and W. Blumenthal, "Merger Control: Key International Norms and Differences", in *Research Handbook on International Competition Law* (A. Ezrachi, ed.) (2012), at 326-340.

92. For case studies of these incidents, see M. Harrison, "US versus EU Competition Policy: The Boeing-McDonnell Douglas Merger", available at www.american.edu/aces/pages/publications.html, and J. Grant and D. Neven, "The Attempted Merger between General Electric and Honeywell: A Case Study of Transatlantic Conflict", 1 (3) *Journal of Competition Law and Economics* 595 (2005).

of other States are irrelevant to that decision. Moreover, there are a number of reasons apart from differences in substantive law why two regulatory authorities might come to opposite results in reviewing transactions like these. In the context of merger approval, for instance, the authorities might operate in discrete geographical markets with different competitive conditions, such that the effect of the proposed merger in each market would vary. In this sense, entities engaged in transnational activity must expect some outcome differences.

Nevertheless, the uncertainty in outcome – even in cases where the market in question is global, and thus one would expect a similar outcome of review – might dissuade companies from engaging in consumer welfare-enhancing transactions [93]. Finally, the more crowded the regulatory field becomes, and the more globalized business activity becomes, the more problematic these outcome differences will be. For many years, the European Union and the United States were the only active regulators among major markets in the area of competition law. In recent years, however, additional States have adopted comprehensive merger regulations. China, for instance, implemented a competition law in 2008 under which its Ministry of Commerce has the authority to review transactions involving participants active in the Chinese market, even when each of the entities involved has a relatively low level of turnover in China [94]. As other major markets adopt full-scale merger review processes, these sorts of regulatory overlaps will increase.

3. The "most restrictive law" problem

Because regulatory conflict does not result in the choice of a single governing law but rather requires compliance with all applicable laws, some types of transactions or courses of conduct may ultimately be subject to the most restrictive legal system involved. If just one competition authority blocks a proposed merger on the basis of a possible restraint, for example, then the transaction cannot go forward regardless of whether other affected countries find it acceptable. In effect, the State with the most restrictive standards regulates conditions not only within its own territory but elsewhere as well.

The regulation of data protection again provides a useful focal point for examining this effect. In 2000, the European Commission and the

93. D. Sokol and W. Blumenthal, *supra* footnote 91, at 326.
94. T. Calvani and K. Alderman, "BRIC in the International Merger Review Edifice", 43 *Cornell International Law Journal* 73 (2010).

US Department of Commerce negotiated a set of principles outlining various requirements for the collection and handling of personal data. Those principles were designed to bridge major substantive differences between the US and the EU data protection regimes, and therefore called for data protection measures significantly stricter than those applicable under US law. Following their adoption by the Department of Commerce [95], the European Commission issued a decision concluding that the principles adequately protected the privacy rights of EU residents [96]. Under the resulting mechanism, known as the Safe Harbor, US companies that chose to follow the principles would be protected from any enforcement action in Europe [97]. US companies were of course under no obligation to follow these principles with respect to US (or other non-European) residents. However, it was difficult for enterprises to put systems in place that segregated their data processing functions according to the residence of their customers. Instead, they chose to redesign those functions worldwide. As a result, in essence the European Union's data protection regime was imposed on activity around the world [98]. The same effect is likely to flow from the new GDPR – for example, in changing the way that IT departments respond to data breaches under new and more rigorous notification rules.

4. The "least restrictive law" problem (race to the bottom)

In an era of mobile capital and production inputs, multinational enterprises take substantive differences among regulatory regimes into account when deciding where to operate [99]. In some circumstances, companies may voluntarily subject themselves to regulatory oversight on the stricter end of the spectrum. For instance, proponents of the "bonding hypothesis" suggest that foreign corporate issuers cross-list in the United States because by voluntarily subjecting themselves to

95. US Department of Commerce, "Safe Harbor Privacy Principles and Related Frequently Asked Questions", 21 July 2000.

96. Commission Decision 2000/520/EC, of 26 July 2000 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the Safe Harbor Privacy Principles and Related Frequently Asked Questions Issued by the US Department of Commerce, 2000.

97. Subsequent developments regarding the Safe Harbor are discussed *infra* in Section D.2.

98. See K. Bamberger and D. Mulligan, *Privacy on the Ground: Driving Corporate Behavior in the United States and Europe* (2015), at 65.

99. See K. Meessen, "Economic Law as an Economic Good: Its Rule Function and Its Tool Function in the Competition of Systems", in K. Meessen (ed.), *Economic Law as an Economic Good* (2009), at 3.

the more rigorous US disclosure and enforcement regime, they send a signal to the markets that allows them to achieve higher valuation [100]. In other circumstances, however, companies may prefer more relaxed regulation. For instance, they may seek out jurisdictions with less stringent environmental standards or labour laws in an effort to lower their production costs. Similarly, enterprises frequently organize their operations to take advantage of low taxation rates in particular countries [101]. This gives countries an incentive to loosen their regulatory laws in order to attract foreign investment. In a climate of regulatory competition, the result may be a sub-optimal level of corporate oversight [102].

5. Systemic risk

A final consequence of substantive differences among regulatory regimes is the inability adequately to address certain forms of systemic global risk. Here a useful illustration is found in the area of derivatives regulation.

Following the global financial crisis, the G20 countries mobilized to regulate markets in cross-border financial derivatives. The resulting top-down process began with consensus agreement on three core regulatory commitments: (1) all standardized over-the-counter (OTC) derivative contracts should be traded on exchanges or electronic trading platforms, and cleared through central counter-parties; (2) OTC derivative contracts should be reported to trade repositories; and (3) non-centrally cleared contracts should be subject to higher capital requirements [103]. The Financial Stability Board, a "meta-network" of finance, banking, and supervisory and regulatory authorities, was tasked with co-ordinating efforts to implement these commitments in national regulatory regimes. In some systems, significant progress has been made – Australia, the European Union, Japan, Singapore, and the United States, for instance, have engaged in wide-reaching legislation

100. See J. Coffee, Jr., "Racing Towards the Top? The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance", 102 *Columbia Law Review* 1757 (2002).

101. See discussion in Chapter II, Section 2.2.

102. Nakagawa, *supra* footnote 55, at 5. For a critical examination of the claim that globalization leads to a race to the bottom, see D. Vogel and R. Kagan (eds.), *Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies* (2004).

103. Financial Stability Board, "Implementing OTC Derivatives Market Reforms" (2010), 7.

and rule-making in this area [104]. However, the resulting reforms vary significantly in substance across jurisdictions. On issues including regulatory exemptions for certain dealers, specific reporting obligations, and margin and collateral requirements, different legal regimes have adopted different regulatory norms.

The vast majority of transactions in financial derivatives are cross-border, involving a dealer and a counterparty located in different countries. As a result, the substantive differences that have emerged across regulatory regimes create uncertainties for market participants, as well as the risk of overlapping and incompatible requirements. In a 2015 report, the International Swaps and Derivatives Association expressed the following concern:

> "Rather than being subject to multiple, potentially inconsistent requirements, derivatives users are increasingly choosing to trade with counterparties in their own jurisdictions. The result is a fragmentation of liquidity pools along geographic lines, which reduces choice, increases costs, and will make it more challenging for end users to enter into or unwind large transactions, particularly in stressed markets." [105]

Here the problem is not merely the increased regulatory burden on market participants. If this concern is well-founded, the market fragmentation occurring in response to substantive regulatory differences may undermine the systemic stability that is the goal of derivatives regulation to begin with. In this way, substantive conflicts can impede the development of solutions to truly transnational regulatory challenges.

D. Mitigating Substantive Conflicts

Both courts and regulatory agencies generally refuse to enforce the public law of another State – a practice that has been labelled the "public law taboo" [106]. As Jürgen Basedow explains, the refusal to apply foreign regulatory law has its roots in the distinction between public and private

104. Financial Stability Board, "OTC Derivatives Market Reforms: Twelfth Progress Report on Implementation" (29 June 2017), 3-4, available at www.fsb.org under "Progress Reports".

105. International Swaps and Derivatives Association, "Briefing Notes, The Dodd-Frank Act: Five Years On" (2015), 8.

106. A. Lowenfeld, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction", *Recueil des cours* (1979), at 322-324; W. Dodge, "Breaking the Public Law Taboo", 43 *Harvard International Law Journal* 161 (2002).

law: "[F]oreign economic regulations are regarded as an expression of a foreign political will and of a foreign public interest which it is not the task of the forum's justiciary to protect." [107] As a result, in a system that observes this taboo, conflicts of regulatory law are not resolved through the application of choice-of-law rules [108]. The charge of regulatory agencies is to apply domestic law to events or transactions that fall within that law's scope. The charge of courts, in adjudicating private causes of action that allege a violation of domestic regulatory law, is to decide whether the conduct in question falls within the scope of the relevant law. If it does, they apply that law to resolve the claim; if it does not, they will simply dismiss the claim. In neither public regulation nor private enforcement will another State's regulatory law be applied.

The taboo has relaxed somewhat over time, at least in the context of private enforcement. For example, some European systems contemplate the applicability of foreign competition law to private claims under certain circumstances [109]. In the United States, courts technically may apply foreign regulatory law to claims over which they assert supplemental jurisdiction, although in practice they generally decline to do so [110]. Nevertheless, the taboo remains a powerful limitation, and consequently conflicts of regulatory law are less easily resolved than conflicts of private law. As Andreas Lowenfeld explains,

> "In ordinary actions involving parties or activities in more than one state, I think that choice of law plays a kind of mediating role among the laws of the states touched in some way by the transaction or controversy. When the opportunity to engage in choice of law is absent, the mediating rule is absent as well." [111]

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107. J. Basedow, "Conflicts of Economic Regulation", 42 *American Journal of Comparative Law* 423 (1994), at 425.

108. F. A. Mann, "Conflict of Laws and Public Law", 132 *Recueil des cours* (1971), at 118-119. See also J. Basedow, "Conflicts of Economic Regulation", 42 *American Journal of Comparative Law* 423 (1994), at 425 (noting the absence of bilateral rules as a feature of conflict of laws methods in the area of economic regulation).

109. For instance, Swiss private international law includes a bilateral rather than unilateral choice of law rule for claims based on restraints of competition. See Switzerland: Statute on Private International Law of 18 December 1987, Art. 137, published in 29 *International Legal Materials* (1990), p. 1244.

110. Exercising this form of jurisdiction, a US federal court could apply foreign law to adjudicate the claims of one set of plaintiffs (for instance, foreign investors in the securities of a particular issuer) that were substantially related to claims of another set of plaintiffs over which the court had jurisdiction (for instance, domestic investors in the same issuer).

111. A. Lowenfeld, *International Litigation and the Quest for Reasonableness* (1996), at 5.

In the absence of choice-of-law rules applicable to conflicts of economic law, a variety of methods are used to resolve such conflicts.

1. Bilateral agreements allocating regulatory authority

Treaties can eliminate potential conflict by negotiating a division of regulatory authority over particular cross-border conduct. A primary illustration of this approach is found in the area of taxation. A country's power to impose taxes can arise either from the status of the taxpayer as a citizen or resident of that country (or a company incorporated in that country), or from the fact that the income in question was generated within its borders. Therefore, cross-border business transactions would often be subject to double taxation if every country asserted its taxing power to the fullest extent. In addition, transactions would be subject to potentially conflicting regulation on issues like the availability of tax exemptions. Countries have solved these potential conflicts of law by entering into bilateral tax treaties that set forth clear mechanisms for the co-ordinated taxation of international business arrangements [112].

2. Mutual recognition

Another way States can mitigate conflict between their laws is to negotiate bilateral or multilateral mutual recognition agreements. Pursuant to such agreements, States can recognize compliance with each other's regulatory regimes as an adequate substitute for compliance with their own [113]. Within these frameworks, States retain regulatory authority over the relevant cross-border activity – they simply agree to recognize compliance with foreign regulations as sufficient to satisfy their own requirements [114].

The ongoing process of developing a regulatory framework for cross-border financial derivatives provides a good illustration of this technique. The two major regulators in that arena, the United States and the European Union, each enacted legislation in the wake of the global

112. See generally R. Avi-Yonah, "Double Tax Treaties: An Introduction", in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (K. Sauvant and L. Sachs, eds., 2009).

113. P.-H. Verdier, "Mutual Recognition in International Finance", 52 *Harvard International Law Journal* 55 (2011).

114. A. Artamonov, "Cross-Border Application of OTC Derivatives Rules: Revisiting the Substituted Compliance Approach", 1 *Journal of Financial Regulation* 206 (2015).

financial crisis that had broad geographic scope. The US Dodd-Frank Act, for instance, included a provision stating that US law would apply to foreign swap activities that had "a direct and significant connection" with activities in US commerce [115]. The European Market Infrastructure Regulation, similarly, provided that EU law would apply to certain foreign swap activities that were deemed to have a "direct, substantial and foreseeable effect within the Union" [116]. Both the United States and the European Union objected to the possible application of the other's laws to local swaps dealers. This led to a protracted dispute regarding the content and rigour of the respective supervisory and enforcement regimes, focusing on issues such as clearing requirements, reporting obligations, and the availability of exemptions for certain market participants. Ultimately, both sides adopted regulations in particular areas establishing a substituted compliance framework, pursuant to which they agreed to recognize compliance with the other's regulations as satisfying their own regulatory requirements [117].

The history of efforts to develop "interoperable" data protection regimes also illustrates the mechanism of substituted compliance. The 1995 EU Directive establishing the rules governing data transfers [118] provided that member States were allowed to permit the transfer of data to a third country only if that country ensured an "adequate level" of protection. In the event of such a finding, no additional guarantees would be required – in other words, compliance with the relevant foreign regime would be treated as sufficient to meet the EU regulatory standards. Pursuant to this mechanism, the Commission in 2000 adopted a safe harbour applicable to US companies that chose to adhere to guidance concerning data protection issued by the US Department of Commerce [119]. In 2015, however, the European Court of Justice

115. 15 USC, § 722(d).

116. Commission Delegated Regulation (EU) No. 285/2014 supplementing Regulation (EU) No. 648/2012 of the European Parliament and of the Council, 2014 OJ (L 85/1).

117. See accounts in Artamonov, *supra* footnote 114, and H. Buxbaum, "Transnational Legal Ordering and Regulatory Conflict: Lessons from the Regulation of Cross-Border Derivatives, 1 *UC Irvine Journal of International, Transnational and Comparative Law* 91 (2017).

118. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ (L 281) (repealed by the GDPR).

119. Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (OJ L 215, 28.8.2000, 7).

invalidated the Safe Harbour, holding in *Schrems* v. *Data Protection Commissioner* that the data protection principles it laid out did not in fact provide adequate protection [120]. The Governments resumed negotiations, and agreed on a revised set of data protection principles known as the EU-US Privacy Shield. In 2016 the Commission adopted a determination that, with respect to companies operating within the Privacy Shield, the United States ensures an adequate level of protection for personal data transferred out of the European Union [121].

The GDPR that went into effect in 2018 continues the use of a substituted compliance mechanism. Article 45 of that Regulation provides that

> "A transfer of personal data to a third country . . . may take place where the Commission has decided that the third country . . . ensures an adequate level of protection."

Such a decision would follow an assessment by the Commission of a foreign State's data protection regime, including a consideration of its specific legislation and data protection rules; its commitment to the rule of law; the existence and function of its supervisory authorities; and the availability of enforcement mechanisms [122].

It is important to recognize the limits of this substituted compliance technique. It depends entirely on the level of granularity at which equivalence determinations must be made, since no two regulatory regimes will be substantively comparable in all their details. The *Schrems* decision itself illustrates the complexity of such determinations. In that decision, the European Court of Justice agreed that "adequate protection" as mandated by Article 25 of the 1995 Directive did not mean protection identical to that guaranteed within the European Union. Nevertheless, it concluded, it must ensure protection "essentially equivalent" to that level [123]. (The Court went on to conclude that the safe harbour determination did not contain sufficient findings regarding rules in the United States that would limit infringement of the fundamental rights of EU citizens regarding their data, particularly in connection with national security investigations.) In the case of derivatives regulation as well, debates arose concerning

120. Case C-362/14, *Schrems* v. *Data Prot. Comm'r*, 2015 ECR 650, para. 21 (6 October 2015).

121. Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC, OJ (L 207/1).

122. GDPR, Art. 45 (2), (3).

123. *Schrems*, *supra* footnote 120, at para. 73.

the level of specificity at which adequacy determinations should be made. Some regulators were satisfied with compatibility of overarching regulatory objectives and outcomes; others sought more fine-grained comparisons of individual rules [124].

Nevertheless, substituted compliance can be an effective tool in mitigating the conflict that would otherwise flow from mutual recourse to extraterritorial regulation. In addition, the patterns and practices that develop over time as regulators become more familiar with each other's systems may also contribute to the ultimate harmonization of the relevant legal norms.

3. *Unilateral restrictions on the geographic scope of domestic regulatory law*

(a) *Through rule-making*

As outlined above, given the increasingly global aspect of business activity, States must frequently apply their own laws to foreign conduct in order adequately to protect local economic interests. This reality is reflected in the text of many legal instruments, particularly those adopted in recent decades. Such instruments often contain explicit provisions indicating their application to transactions and conduct occurring outside the borders of the enacting State. In such cases, the eventual enforcement of the law often creates a substantive conflict with the law of another State. That situation may then launch an iterative process of fine-tuning the law's regulatory scope. By this means, lawmakers – or the agencies responsible for implementing the relevant law – adjust the scope of application to mitigate conflicts of substantive law.

In the United States, one example of this approach is seen in the context of financial reform. The Sarbanes-Oxley Act of 2002 [125] sought to improve regulatory oversight in two interrelated areas: public accounting and corporate governance. One of the Act's central pillars is a requirement that any company whose securities are listed in the United States maintain an audit committee. The law specifies certain substantive standards for the function of these committees; for instance, it requires that audit committee members be independent directors, unaffiliated with the issuer on whose board they serve. The sections

124. Buxbaum, *supra* footnote 117, at 115.

125. The Public Company Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107-204, 107th Congress 2d Session.

imposing this requirement clearly defined covered entities to include not only domestic but also foreign companies [126].

The law's enactment met immediate opposition on the ground that it created direct substantive conflict with foreign corporate governance regimes. Subsequently, the US Securities and Exchange Commission adopted rules that adjusted these provisions as applied to foreign issuers, clarifying and narrowing their application in order to reduce conflicts with the laws of other countries [127]. For instance, in response to conflicts with systems that require employee representation on their boards, the final regulation adopted an exemption under which non-management employees are permitted to sit on audit committees. Similarly, it crafted a complete exemption from the audit committee requirements for foreign issuers subject to the oversight of an independent local board of auditors.

(b) *Through the process of statutory construction*

While some laws do include provisions articulating their own geographic scope, many – particularly those enacted prior to the era of globalization – do not. Regulatory laws may simply prohibit certain conduct, without specifying whether the conduct, the actor, or the conduct's effects must be within the territory of the enacting State in order to trigger the law's application. As a result, in claims that involve the application of such laws in a multistate context, courts must determine the lawmaker's intent regarding geographic scope. This is true not only in private litigation but also in the context of public enforcement, since the target of an agency's investigation may resist on the ground that the law in question does not reach its activity.

In ascertaining the scope of an ambiguous law, courts use all the usual tools of statutory interpretation. This section explores the role that one particular doctrine, the "presumption against extraterritoriality", plays in minimizing substantive conflicts in US-based litigation. Over the course of the past decade, the US Supreme Court has significantly altered its interpretation and application of the presumption. It has sketched out a more expansive role for the presumption, with the result that it now more forcefully constrains the application of US regulatory law in multistate cases. Because these changes achieve a substantial

126. Sarbanes-Oxley Act, § 301.
127. Standards Relating to Listed Company Audit Committees, Release No. 33-8820 (2003).

reorientation of US law on prescriptive jurisdiction, they are treated at some length.

(i) *Background*

As formulated in one leading case, the presumption against extra-territoriality articulates a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'" [128]. This presumption dates back to the period well before the advent of effects-based jurisdiction. Early cases employed it to align the process of statutory construction with the then-prevailing understanding that laws had no force beyond the territorial borders of the enacting State. In an 1824 case examining the scope of US customs law, for instance, the Supreme Court stated that

> "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction." [129]

Although the strict territorialism of this era faded, use of the presumption continued, albeit with a variety of different justifications. Some grounded the doctrine's application in the separation of powers, stating that a restrained interpretation of laws' scope would lessen the danger of judicial interference in the conduct of foreign policy [130]. Some simply suggested that the presumption provided a way to approximate Congress's intent, on the assumption that Congress ordinarily has domestic rather than foreign matters in mind [131]. The leading justification for the presumption, however, was the desire to avoid the "international discord" that would result from clashes between domestic and foreign

128. *EEOC* v. *Arabian American Oil Co.*, 499 US 244, 248 (1991) (quoting *Foley Bros.* v. *Filardo*, 336 US 281, 285 (1949)).

129. *The Apollon*, 22 US 362, 370 (1824).

130. For a discussion of this justification, see Curtis A. Bradley, "Territorial Intellectual Property Rights in an Age of Globalism", 37 *Va. J. Int'l L.* 506 (1997), at 550-561.

131. *Microsoft Corp.* v. *AT&T Corp.*, 550 US 437, 454 (2007) ("United States law governs domestically but does not rule the world . . .").

law [132]. In other words, avoiding substantive conflicts of laws became a primary objective in applying the presumption.

For many years the presumption was used inconsistently. The Supreme Court applied it in many but not all of its decisions in the area of legislative jurisdiction [133]; moreover, the formulation for determining when the evidence of congressional intent was clear enough to rebut the presumption varied from case to case. In a spate of recent decisions, however, the Court has revisited the presumption and provided additional guidance on its operation.

(ii) Morrison *v.* National Australia Bank Ltd.

The first in this line of cases, *Morrison* v. *National Australia Bank Ltd.* [134], was decided in 2010 and addressed the reach of the anti-fraud provisions of US securities law. The relevant provision, Section 10 *(b)* of the Securities Exchange Act, simply prohibits manipulation or deception in connection with securities transactions; it does not speak explicitly to its own scope [135]. For decades, courts had interpreted the provision to reach both fraudulent conduct taking place within the United States – even if that conduct harmed only foreign investors – and fraudulent conduct taking place elsewhere whose effects were felt within the United States. Of particular concern, lower courts had sometimes applied this anti-fraud provision to so-called "foreign-cubed" claims: claims of foreign investors, against foreign issuers, arising out of foreign investment transactions. Such claims inevitably bring US law into significant conflict with the laws of another jurisdiction. It was that kind of claim that was at issue in *Morrison*: the plaintiffs were Australian residents who sued an Australian issuer for losses resulting from an Australian investment transaction.

The *Morrison* decision marked a turning point in the Court's extraterritoriality jurisprudence in two respects. First, it adopted a particularly stringent formulation of the presumption. The Court

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132. *Aramco*, 499 US at 248.

133. See generally W. Dodge, "Understanding the Presumption against Extraterritoriality", 16 *Berkeley Journal of International Law* 85 (1998) (outlining the application and purpose of the presumption).

134. 561 US 247 (2010).

135. 15 USC, § 78j(b) (2006). The section makes it unlawful for any person

> "to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[,] any manipulative or deceptive device or contrivance . . .".

stated that the interpretive task is not to "'discern' whether Congress would have wanted the statute to apply" to a particular set of facts, but simply to ascertain whether the statute itself clearly indicates that it has extraterritorial reach [136]. It did offer assurances that the presumption in this form was not intended to operate as a "'clear statement rule', if by that is meant a requirement that a statute say 'this law applies abroad,'" and stated that "[a]ssuredly context can be consulted as well" [137]. Nevertheless, the opinion was widely read as requiring a more explicit indication of Congressional intent to overcome the presumption than previous cases had required [138]. Applying this test, the Court concluded that Section 10 *(b)* lacked clear indication of extraterritorial reach [139].

Second, *Morrison* introduced a further analytical step to determine when a "non-extraterritorial" statute could permissibly be applied to cases involving both foreign and domestic elements. That was the situation in *Morrison*: the plaintiffs alleged that the fraudulent conduct causing their injuries had occurred within the United States [140], and therefore that their claim required merely "domestic application" of the statute [141]. The Court stated that the presumption against extraterritoriality was relevant in this context as well [142]. It held that in such cases the court must identify the "focus of congressional concern" in enacting the statute in question [143]. If the thing that was the focus of that concern occurred outside the United States, then the statute's application would be impermissibly extraterritorial despite the presence of other factors connecting the dispute to the United States. Concluding that "the focus of the [securities laws] is . . . [only on] purchases and sales of securities in the United States" [144], it held that the provision applies to fraud only in connection with "transactions in securities listed on domestic exchanges, and domestic transactions in

136. 561 US at 255.
137. *Ibid.* at 265.
138. See, e.g., L. Brilmayer, "The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption against Extraterritorial Application of American Law", 40 *Southwestern Law Review* 655 (2011), at 656 (describing the opinion as "raising the evidentiary standard for rebutting the presumption").
139. 561 US at 265.
140. 561 US at 251-253.
141. 561 US at 266.
142. *Ibid.* ("[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case").
143. *Ibid.*
144. 561 US at 266.

other securities" [145]. As a result, it held that US law did not apply to the plaintiffs' claims.

(iii) Kiobel *v.* Royal Dutch Petroleum Co.

Three years later, the Court revisited the presumption against extraterritoriality in *Kiobel* v. *Royal Dutch Petroleum Co.* [146], a case brought under the Alien Tort Statute (ATS). That statute, enacted in 1789, gives US federal courts jurisdiction over a very specific category of claims: tort claims, brought by non-US plaintiffs, where the tort in question is also a violation of international law [147]. Beginning in the 1980s, the ATS was used as a vehicle for human rights litigation arising out of events occurring outside the United States. In a practice that became particularly controversial, the statute was used to provide a jurisdictional basis for claims against corporate defendants (including non-US entities) arising out of conduct occurring outside the United States. In *Kiobel*, the Supreme Court considered whether the ATS was intended to reach such claims.

A previous case had concluded that the ATS is "strictly jurisdictional"; in other words, it authorizes federal courts to recognize causes of action under international law, but does not itself regulate conduct [148]. A preliminary question at issue in *Kiobel* was whether the presumption against extraterritoriality applied at all to a non-conduct regulating statute. In a divided opinion, the Court held that "the principles underlying the canon of interpretation" were implicated in the ATS context, and that the presumption therefore did apply to causes of action under the ATS. This aspect of the opinion significantly expanded the operation of the presumption against extraterritoriality.

The remainder of the opinion focused on the foreign policy implications of ATS claims. Those claims are unusual precisely because the ATS merely confers jurisdiction on US courts to hear a particular type of case, but does not itself create a cause of action. The statute requires courts to fashion federal common-law remedies for violations of international law. As a result, ATS litigation frequently gives rise to a wide range of substantive and procedural questions concerning the

145. 561 US at 266.
146. 569 US 108 (2013).
147. 28 USC, § 1350. The statute in its entirety reads as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."
148. *Sosa* v. *Alvarez-Machain*, 542 US 692, at 713 (2004).

existence and scope of such remedies. These questions concern issues including exhaustion requirements, the source of governing law, the possibility of claims for aiding and abetting, and the amenability of corporations to suit, among others [149]. The Court concluded that the "danger of unwarranted judicial interference in the conduct of foreign policy" [150] was therefore significant, justifying application of the presumption against extraterritoriality. Given the absence of any clear indication that Congress intended the ATS to have extraterritorial reach, the Court concluded that the presumption had not been overcome. Thus, claims like the petitioners' that seek relief "for violations of the law of nations occurring outside the United States" are no longer viable [151]. (In the final passage of the decision, however, the Court stated that a claim that "touch[ed] and concern[ed] the territory of the United States . . . with sufficient force" might be permissible [152].)

(iv) RJR Nabisco, Inc. *v.* European Community

Finally, in 2016, the Court decided *RJR Nabisco, Inc.* v. *European Community* [153]. In this case, introduced above, the European Community sued tobacco manufacturers for damages arising from allegedly unlawful activity in the European market [154]. The Court first applied the *Morrison* test to the substantive provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO). That statute, enacted in 1970, creates four criminal offences prohibiting certain patterns of racketeering activity [155]. It defines racketeering activity to include a wide range of both state and federal offences, which are referred to as the "predicates" to liability [156]. RICO's substantive provisions contain no explicit statement regarding the law's geographic scope. However, many of the predicate offences to which the act refers explicitly apply to foreign conduct [157]. The Court correctly recognized this as an "obvious

149. See generally B. Stephens and M. Ratner, *International Human Rights Litigation in US Courts*, 1996.
150. 569 US at 116.
151. 569 US at 124.
152. 569 US at 125.
153. 136 S. Ct. 2090 (2016).
154. See *supra* footnote 6 and accompanying text.
155. 18 USC, § 1962.
156. 18 USC, § 1961 (1).
157. The Court provides as examples the prohibitions against "engaging in monetary transactions in criminally derived property, . . . assassination of Government officials, . . . and] hostage taking", each of which expressly applies to conduct outside the United States.

textual clue" that Congress intended RICO to apply extraterritorially – at least in cases involving those forms of activity [158]. It therefore held that the presumption against extraterritoriality had been overcome with respect to claims based on predicate offences that themselves have extraterritorial effect. In other words, it held that RICO's geographic scope tracks the geographic scope of the predicate offences involved in a particular case.

The surprising part of the Court's opinion came in its second part, which addressed the private cause of action. In addition to creating criminal penalties for racketeering offences, the statute created a private cause of action allowing persons injured by RICO violations to sue in US federal court. The Court concluded that although the presumption against extraterritoriality had been overcome with respect to RICO's substantive provisions, it must nevertheless be applied separately to the provision creating a private cause of action. Here the Court relied on its previous decision in *Kiobel*. It had concluded there that the presumption could be applied to a non-conduct regulating statute. In this case, it applied the presumption to a non-conduct regulating portion of a statute despite the fact that the conduct-regulating provisions of that statute themselves had extraterritorial reach.

Section 1964 *(c)* of RICO states simply that "any person injured in his business or property" by a violation of the statute's substantive provisions may assert a cause of action [159]. Although it recognized "any" as a term that "ordinarily connotes breadth", the Court held that use of that term failed to rebut the presumption against extraterritoriality [160]. Similarly, it concluded, the unqualified reference to "business or property" failed to communicate Congressional intent that business or property interests located outside the United States would be protected by the private cause of action. Stating that "[n]othing in § 1964 *(c)* provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States", it held that RICO creates a cause of action only for *domestic* injury to business or property [161]. As a result, it denied the European Community recovery.

158. 136 S. Ct. at 2101.
159. 18 USC, § 1964(c).
160. 136 S. Ct. at 2108.
161. *Ibid.* at 2111.

(v) *The presumption against extraterritoriality and substantive conflicts*

Historically, one of the leading rationales for the presumption against extraterritoriality has been the avoidance of substantive conflicts – "to protect against unintended clashes between our laws and those of other nations which could result in international discord" [162]. However, the Court states in *Morrison* that "[t]he . . . presumption applies *regardless* of whether there is a risk of conflict between the American statute and a foreign law . . ." [163]. It repeats this statement in *RJR Nabisco*, stating that "[w]e therefore apply the presumption across the board, 'regardless of whether there is a risk of conflict . . .'" [164]. In both cases, it emphasizes another rationale for the presumption: that the legislature "generally legislates with domestic concerns in mind" [165].

On this view, the presumption may be used to bar the application of US regulatory law even in situations where the content of US law and the content of the relevant foreign law is the same, such that no substantive conflict is presented. In this respect, one consequence of the new articulation of the presumption is that it may result in unnecessary retreat from the project of transnational regulation.

4. Accommodating foreign interests in the application of domestic law : the role of comity

International comity is notoriously difficult to define. The concept emerged following the Treaty of Westphalia as a way to reconcile the principle of absolute territorial sovereignty, on the one hand, with the need to recognize legal relationships that cross borders, on the other [166]. Over the years, comity has been variously characterized as a rule of public international law, a form of mere courtesy among sovereigns, and a number of alternatives in between [167]. For present purposes, rather than attempting to fix a definition of the concept, we will focus on two

162. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 US 10, 20-22 (1963).
163. 130 S. Ct. at 2877-2878 (emphasis added).
164. 136 S. Ct. at 2100.
165. *Ibid.*
166. E. Lorenzen, "Huber's De Conflictu Legum", 13 *Illinois Law Review* 375, 378 (1919).
167. F. A. Mann, *Foreign Affairs in English Courts* (1986), at 134; T. Dornis, "Comity", in *Encyclopedia of Private International Law* (J. Basedow, G. Rühl, F. Ferrari and P. de Miguel Asensio, eds., 2017).

of its functions. First, it can serve as a justification for recognizing the acts of a foreign sovereign – for instance, by choosing to apply foreign law to regulate a local occurrence. Second, it can serve as a justification for refraining from the application of local law in a circumstance where that application is likely to give rise to conflict with a foreign system [168]. In both of these ways, comity serves the objective, in the words of one decision, of "helping the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world" [169].

For the most part – and consistent with the public law taboo – it is the second of these functions that is relevant in the context of regulatory conflicts. In a variety of ways, the institutions charged with enforcing regulatory law in the cross-border arena draw on principles of comity in their decision-making.

(a) *Accommodating foreign interests in public enforcement*

As a matter of policy and practice, regulatory agencies routinely take comity into account in their international enforcement activities. Sometimes comity is operationalized in bilateral or multilateral agreements among agencies. In the field of competition regulation, for instance, the European Union and the United States have negotiated a suite of bilateral instruments. The first of these, agreed in 1991, is intended in part simply to improve co-ordination between the relevant agencies in the application of their laws to cross-border activity [170]. To that end, the agreement includes provisions on the reciprocal notification of investigations, sharing of information, and so forth [171]. But the agreement is also intended "to . . . lessen the possibility or impact of differences between the Parties in the application of their competition laws". In support of this objective, the agreement includes a comity provision. Article VI, titled "avoidance of conflicts over enforcement activities," provides as follows:

168. W. Dodge, "International Comity in American Law", 115 *Columbia Law Review* 2071 (2015), at 2079.

169. *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 US 155, 164-165.

170. Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, OJ L 95, 27.4.1995.

171. Chapter IV considers these aspects of this and similar agreements in further detail.

> "Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate. In considering one another's important interests in the course of their enforcement activities, the Parties will take account of, but will not be limited to, the following principles: . . .
>
> 3. Where it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider the following factors, in addition to any other factors that appear relevant in the circumstances, in seeking an appropriate accommodation of the competing interests . . ."

The article goes on to list a number of factors to consider, including items such as the relative significance of the conduct and its effects on the States involved.

The agreement also includes a so-called "positive comity" provision, which was expanded in a subsequent agreement concluded in 1998 [172]. That agreement states that each competition agency may request the other to take enforcement action in the event that anti-competitive activities occurring within the territory of the requested State adversely affect the requesting State's interests. Another provision indicates that the requesting agency will normally defer or suspend its own enforcement activity in reliance on the requested agency's action [173]. Although agreements of this type are invoked only rarely, they have been recognized as positive signals of the parties' shared commitment to a co-ordinated regulatory response [174].

More recently, in 2011, the European Union and United States developed a set of best practices on co-operation in the particular area of merger investigations [175]. These guidelines cover issues such as the

172. Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, OJ L 173, 18.6.1998.

173. *Ibid.*, Art. IV.

174. OECD, CLP Report on Positive Comity, DAFFE/CLP (99)19, at p. 16 (1999).

175. US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, 14.10.11, available at http ://ec.europa.eu/competition/mergers.

co-ordinated timing of joint investigations and, where appropriate, the sharing of information between agencies. Like the earlier general agreement, their primary purpose is to provide for mechanisms such as information sharing and the alignment of review timetables in order to co-ordinate overlapping regulation. However, the guidelines also seek to minimize outcome conflicts, in a section addressing co-ordination at the remedial stage of merger investigations [176]. Here, the suggestion is that close co-operation might assist the agencies in agreeing on "consistent and non-conflicting remedies" [177]. This kind of approach will not solve the most fundamental conflicts of regulatory law, but can assist in resolving lower-order conflicts.

Regulatory agencies may also choose to integrate comity considerations into unilateral enforcement practices. In the United States, for example, the 2017 Antitrust Guidelines for International Enforcement and Cooperation include a section on comity (drawing on analogous provisions included in the 1995 Guidelines).[178] That section provides that

> "[i]n determining whether to investigate or bring an action, or to seek particular remedies in a given case, the [Department of Justice and the Federal Trade Commission] take into account whether significant interests of any foreign sovereign would be affected",

and sets forth a number of factors for the agencies to consider in performing such an analysis.

(b) *Accommodating foreign interests in private enforcement*

Similarly, courts often invoke comity in addressing the application of domestic regulatory law to claims with foreign elements. In the United States, that approach found perhaps its fullest expression in the "interest balancing" approach of the Restatement (Third) of Foreign Relations Law [179]. Section 403 of that Restatement sought to accommodate foreign interests in two separate analytical steps.

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176. Best Practices, Chapter V.
177. Best Practices, para. 17.
178. US Department of Justice and Federal Trade Commission, Antitrust Guidelines for International Enforcement and Cooperation, para. 4.1 (13 January 2017).
179. American Law Institute, Restatement (Third) of Foreign Relations Law (1987).

First, Section 403 took foreign interests into account in determining whether domestic law reached a particular transaction or event – a question of the law's scope, which was answered on a case-by-case basis. At this step, a court considering the exercise of legislative jurisdiction was required to analyse whether that exercise would be reasonable in the particular case, taking into account:

> "all relevant factors, including, where appropriate:
>
> *(a)* the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> *(b)* the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> *(c)* the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> *(d)* the existence of justified expectations that might be protected or hurt by the regulation;
>
> *(e)* the importance of the regulation to the international, political, legal, or economic system;
>
> *(f)* the extent to which the regulation is consistent with the traditions of the international system;
>
> *(g)* the extent to which another state may have an interest in regulating the activity; and
>
> *(h)* the likelihood of conflict with regulation by another state" [180].

Second, if the court determined that domestic law did reach the relevant transaction or event, the Restatement directed it to consider whether another country's law also reached the same transaction or event, presenting a conflict of laws. At that step, the court was expected to evaluate its own and the other States' interests in light of the above-listed factors. A State should then defer to another State whose interest is "clearly greater" [181]. Consistent with the public law taboo, such

180. American Law Institute, Restatement (Third) of Foreign Relations Law, § 403 (2) (1987).
181. *Ibid.*, § 403 (3).

deference would take the form of dismissing the claim, not applying foreign law to resolve it. Courts applying this test recognized its roots in comity [182]. However, Section 403 is a "hard law" version of comity-based analysis, in that it presents the balancing of foreign and domestic interests as a requirement of international jurisdictional law [183].

Section 403 achieved some currency for a period of time toward the end of the twentieth century, particularly in the area of competition law. It never became fully entrenched in the jurisprudence, however, at least partly as a result of judicial discomfort with the concept of balancing the sovereign interests expressed in public law [184]. In a 2004 case, the Supreme Court (albeit in dicta) appeared to reject this form of reasonableness analysis, suggesting that the application of US law to foreign conduct was *per se* reasonable, and "hence consistent with principles of prescriptive comity", when such conduct caused injury within the United States [185].

The US Supreme Court's recent decisions on the extraterritorial application of regulatory law, discussed above, suggest a different orientation toward comity. First, more clearly than in earlier cases, the Court has expressed a preference for using the presumption against extraterritoriality as the primary, if not the only, tool for determining the applicability of US law to claims with foreign elements. *Morrison* includes the following statement:

> "The results of judicial-speculation-made-law – divining what Congress would have wanted if it had thought of the situation before the court – demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." [186]

Indeed, in some passages of the relevant opinions, the Court seems to suggest that it rejects case-by-case comity analysis even as a *supplement* to the presumption against extraterritoriality [187]. Dicta in

182. See, e.g., *Timberlane Lumber Co.* v. *Bank of America*, 549 F. 2d 597, 615 (9th Cir. 1976).

183. For a critique of this approach, see B. Gans, "Reasonableness as a Limit to Extraterritorial Jurisdiction", 62 *Washington University Law Quarterly* 681 (1985).

184. See, e.g., *Laker Airways* v. *Sabena, Belgian World Airlines*, 731 F. 2d 909 (DC Cir. 1984).

185. *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 US 155, 165 (2004).

186. *Morrison*, 561 US 247 (2010), at 248.

187. *RJR Nabisco*, 136 S. Ct. at 2101.

Morrison states that if the Court had concluded that Section 10 *(b)* did apply abroad, then it "would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation)" [188]. Although the parenthetical is somewhat ambiguous, the Court may mean that a federal statute must be applied to all claims that are deemed to fall within its scope, barring applicability of some rule (for instance, *forum non conveniens*) that governs issues other than legislative jurisdiction.

Recall the observation above regarding the breadth of the presumption against extraterritoriality as reframed in *Morrison* and *RJR Nabisco.* In those cases, the Court stated that the presumption applies even if there is no risk of substantive conflict between US and foreign law [189]. As a result, the presumption might prevent the application of US law in cases where regulation might be desirable. Here, the opposite dynamic is at work. In cases in which the presumption has been overcome, the application of US law without further analysis might cause significant conflict. Consider for example the securities law at issue in *Morrison* itself. In construing Congressional intent regarding the reach of the anti-fraud provisions, the Court had arrived at a bright-line test: Section 10 *(b)* applies to claims arising out of domestic securities transactions, but not to those arising out of foreign securities transactions. In other words, the presumption does not bar the application of US law to claims arising out of domestic transactions, even if those claims involve significant foreign elements. However, depending on the particular foreign elements in question, the application of US law to such claims risks significant conflict with foreign law. In such a case, the presumption alone does not sufficiently account for relevant foreign interests.

Lower courts have already appreciated this difficulty. In one securities case following *Morrison*, for example, a federal appeals court considered a claim arising out of a securities-based swap agreement between the plaintiffs and certain counterparties [190]. The agreement referenced the stock of Volkswagen, a Germany company; in other words, the value of the swap to the plaintiffs depended on the price of Volkswagen stock. The plaintiffs alleged that Porsche Automobil Holding, another German company, had made fraudulent statements

188. *Morrison,* 561 US 247 (2010), at 267 n. 9. The Court quotes this passage in *RJR Nabisco*, 136 S. Ct. at 2101.

189. See discussion in D.3 *(b)*, *supra.*

190. *Parkcentral Global Hub Ltd.* v. *Porsche Auto. Holdings SE*, 763 F. 3d 198 (2d Cir. 2014).

(largely in Germany) that adversely affected Volkswagen's stock price and thus the value of the plaintiff's investment. Because the claim arose in connection with a domestic transaction (the swap agreement), the application of US law would have been "permissibly territorial" under the *Morrison* rule. However, it involved foreign securities and a foreign defendant that was not itself party to the transaction. Describing the claims as "predominantly foreign", the court concluded on the basis of comity that US law did not apply to the plaintiffs' claims. In a concluding passage, it emphasized the need to retain flexibility to consider case-specific factors:

> "In a world of easy and rapid transnational communication and financial innovation, transactions in novel financial instruments . . . can come in innumerable forms of which we are unaware and which we cannot possibly foresee. . . . We believe courts must carefully make their way with careful attention to the facts of each case and to combinations of facts that have proved determinative in prior cases . . ." [191].

In other contexts as well, courts routinely invoke comity in concluding that particular transactions or activities fall outside the intended scope of US law. This is common in insolvency proceedings, for example. Various provisions of bankruptcy law have extraterritorial effect [192]. As a result, the application of certain rules, such as rules regarding the avoidance of fraudulent transfers, can create a conflict between US law and the law of the State in which property of the debtor is located. In addressing such conflicts, US bankruptcy courts often engage in a comity-based analysis to determine the question of legislative jurisdiction – that is, to ascertain whether the State has "refrain[ed] from prescribing laws that govern activities connected with another state" when the application of that law would be unreasonable [193].

The recently adopted Restatement (Fourth) of Foreign Relations Law attempts to synthesize this line of cases with the Supreme Court's recent extraterritoriality jurisprudence. It omits reasonableness analysis

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191. *Op. cit. supra* footnote 190 at 217.

192. Most fundamentally, Section 541 of the US Bankruptcy Code defines all of a debtor's property, whether located inside or outside the United States, to be "property of the estate" subject to the *in rem* jurisdiction of the US bankruptcy court.

193. *In re Maxwell Communication Corp. plc*, 93 F. 3d 1036 (2d Cir. 1996). See also *In re French*, 440 F. 3d 145, 153 (4th Cir. 2006) ("at base comity involves the recognition that there are circumstances in which the application of foreign law may be more appropriate than the application of our own law").

as a mandatory step in determining the scope of application of federal statutes. Instead, it states simply that

> "[t]o avoid unreasonable interference with the legitimate sovereign authority of other states and help the laws of different nations work together in harmony, U.S. courts *may interpret* federal statutory provisions to include other limitations on their applicability as a matter of prescriptive comity" [194].

Up to this point, the discussion has focused on one particular role that comity plays in accommodating foreign interests: setting limits on prescriptive jurisdiction. It is important to note that comity supports other forms of accommodation as well, including in the form of limits on judicial jurisdiction. For instance, as one state court explained,

> "[d]ismissal of a suit on international comity grounds may sometimes be appropriate when there is litigation pending in a foreign forum or, even absent such litigation, when allowing a case to proceed in the United States would intrude on the interests of a foreign government" [195].

This sort of judicial abstention is available even when the claim in question falls within the scope of domestic law. Similarly, comity underpins doctrines of accommodation such as *forum non conveniens* [196].

5. Party agreement on applicable law

One way to resolve conflicts of regulatory law would be to permit the parties to particular types of economic activity to select the law governing that activity. In claims arising out of contractual relationships, some limited moves have been made in this direction. In a much-discussed series of cases involving the Society of Lloyd's, for example, a number of US courts considered claims brought by investors under US securities laws. The investors argued that through conduct occurring in the United States, Lloyd's had fraudulently induced them to join English

194. American Law Institute, Restatement (Fourth) of Foreign Relations Law (2018), § 405 (emphasis added).

195. *Perforaciones Exploracion y Produccion* v. *Maritimas Mexicanas, S.A. de C.V.*, 356 Fed. Appx. 675 (5th Cir. 2009), at 681.

196. See W. Dodge, "International Comity in American Law", 115 *Columbia Law Review* 2071 (2015), at 2105-2016.

underwriting syndicates [197]. Their investment agreements contained choice-of-law clauses selecting English law as well as forum-selection clauses prescribing litigation or arbitration in England.

Rather than determining whether the investors' claims fell within the scope of US anti-fraud law (in which case, presumably, they would have applied that law), the courts analysed the validity and enforceability of the forum selection clauses. The courts recognized that if the claims were litigated in England, English law would apply. Nevertheless, citing the need for predictability and certainty in international commerce, the courts uniformly held that they must be enforced, and therefore dismissed the claims. In subsequent proceedings in England, the investors' fraud claims were resolved, favourably to Lloyd's, under English law.

To some degree, these cases suggest the possibility that regulatory authority over cross-border activity, at least in the case of contractual relationships, could be allocated by the parties themselves. However, that possibility seems relatively remote. The Lloyd's cases themselves were *sui generis*. The investors involved were highly sophisticated; moreover, the courts concluded that with respect to the particular claims, UK law was sufficiently similar to US law that the plaintiffs would be entitled to analogous relief under either regime. In other words, there was no significant substantive conflict of laws involved [198]. Moreover, in the decades since these decisions, few cases have adopted this approach. In some areas, in fact, lawmakers have foreclosed this option. Current EU data protection law, for instance, protects certain core data protection principles from individual waiver [199].

Some scholars have urged a role for party selection of applicable law outside the contractual context as well. Professors Choi and Guzman, for example, proposed a system in which corporate issuers would be permitted to select the securities regime whose laws would govern their securities dealings, thereby choosing the law that would dictate the rights of their investors [200]. Similarly, Professor Rasmussen proposed

197. See, e.g., *Richards* v. *Lloyd's of London*, 135 F. 3d 1289 (9th Cir. 1998); *Roby* v. *Corp. of Lloyd's*, 996 F. 2d 1353 (2d Cir. 1993); *Bonny* v. *Soc'y of Lloyd's*, 3 F. 3d 156 (7th Cir. 1993).

198. But see *Richards* v. *Lloyd's of London*, 135 F. 3d 1289, 1299 (9th Cir. 1998) (Thomas, J., dissenting, on the basis that the laws were not in fact sufficiently similar to draw this conclusion).

199. P. Schwartz and K-N. Peifer, "Transatlantic Data Privacy Law", 106 *Georgetown Law Journal* 115 (2017) at 139.

200. S. J. Choi and A. Guzman, "Portable Reciprocity : Rethinking the International Reach of Securities Regulation", 71 *Southern California Law Review* 903 (1998).

that companies could choose, from a limited set of options, the legal regime that would apply in the event of their insolvency [201]. To date, these proposals have not translated into practice.

E. Challenges in Addressing Substantive Conflicts

1. The persistence of significant diversity among substantive norms

Some of the tools used to address substantive regulatory conflicts are effective only when the conflicts at issue are relatively minor. The contract cases permitting parties to select the law governing securities transactions, for example, depended on a finding that the legal regimes in question were similar enough that the application of one State's regulatory law would offend no public policy of the other State involved. Similarly, the device of substituted compliance can be utilized only between legal regimes whose regulations in the relevant area are closely aligned.

On the one hand, this points to a significant limitation of these tools' potential to mitigate conflict. Significant substantive differences remain among the world's regulatory regimes. Moreover, these mechanisms work only between systems of roughly comparable maturity, and with roughly equivalent forms of regulatory oversight as well as enforcement capacity. States that are still in the process of enacting basic regulatory laws cannot participate meaningfully in such frameworks. On the other hand, it points to the possibility of significant progress in coming decades. Some of the trends described above – for instance, regionalization, and the moves toward substantive convergence – will over time yield greater comparability of systems, opening the door to broader use of conflict mitigation tools. In time, this may generate a virtuous cycle of convergence and accommodation.

2. The special challenges facing private enforcement

Substantive conflicts of law are more difficult to address in the domain of private enforcement than in public regulation. There are no treaties or other instruments that demand judicial co-operation in cases of substantive conflict [202], and courts do not participate in the

201. R. K. Rasmussen, "A New Approach to Transnational Insolvency", 19 *Michigan Journal of International Law* 1 (1997).

202. One significant exception is in the area of international insolvency law. In 1997, UNCITRAL adopted a Model Law on Cross-Border Insolvency that has been adopted

kind of structured transnational networks that public agencies do. If a court confronts a claim that involves significant foreign elements, and therefore creates a substantial risk of conflict with another jurisdiction, all it can do to prevent that conflict is dismiss the claim. Thus, where public agencies can deal with conflict by reaching forward – by seeking to identify points of conflict and find co-operative means of dealing with them – courts are more likely to pull back.

in 43 States. The law empowers courts in different States to communicate directly with each other, promoting co-operation in the resolution of concurrent proceedings.

CHAPTER IV

PROCEDURAL CONFLICTS IN TRANSNATIONAL ECONOMIC REGULATION

A. Introduction

As the previous chapter demonstrated, national law remains the primary source of economic regulation. Because that law differs, often significantly, from country to country, its application in the transnational context creates substantive conflicts. This chapter turns to another form of conflict in the enforcement of regulatory law: conflicts of procedure. Like substantive law, procedural law varies among countries. As a result, the enforcement of law in the cross-border context creates the potential for procedural conflict.

Take for example a regulatory investigation into allegations of consumer fraud by a multinational enterprise. To the extent that the investigating agency requires information beyond that which the target voluntarily provides, it must serve process on relevant individuals, gather documentary evidence from various sources, obtain statements from witnesses, and so forth. Or consider a private lawsuit initiated by a party who suffered harm as a result of a multinational's anti-competitive conduct. The same is true – the defendant must be served with process, documentary and non-documentary evidence must be assembled, and so on. Each of these steps implicates the procedural law of the jurisdiction in which the proceeding takes place. That law differs, often quite substantially, from country to country. If these processes involve parties in multiple jurisdictions, the disparity among various procedural systems can therefore generate additional conflict.

To explore this form of conflict, this chapter focuses on two areas in which procedural conflicts are particularly acute: the discovery of evidence (which is relevant in both public and private enforcement of regulatory law) and the use of group litigation by civil plaintiffs as a mechanism of private enforcement. These two examples highlight how deeply procedural law is embedded in national civil justice systems, and how difficult it can be to resolve procedural conflicts.

B. Conflicts in the Discovery of Evidence

1. Areas of divergence in discovery processes

(a) *Categories of evidence protected from discovery*

All modern evidence regimes recognize the concept of privilege, which operates to shield certain documents or communications from disclosure. A privilege may protect individual rights (as in the case of a privilege against self-incrimination), or the confidentiality of certain relationships (as in the case of a privilege attaching to attorney-client communications). Moreover, States frequently enact legislation protecting certain categories of evidence from disclosure. Common examples of such categories include trade secrets and State secrets.

These types of rules and statutes vary across legal systems in both scope and substance. For example, some States limit the privilege against self-incrimination to individuals, while others extend it to corporate entities as well. Some States protect forms of information that are discoverable in others, such as the customer account information of financial institutions. As a result, the boundaries of the discovery process – both in private litigation and in public regulatory proceedings – may be quite different from country to country.

(b) *The mechanics of discovery in private litigation*

To provide meaningful and effective access to justice, all modern legal systems include procedures to assemble evidence relevant to litigants' legal claims. However, those mechanisms vary widely in their particulars [203]. A historical divide between civil law and common law systems regarding the overall philosophy of developing evidence has generated differences that persist even in the face of ongoing procedural reform. In the United Kingdom, for instance, early cases spoke of the "transcendent utility in the administration of justice" of discovering all truth relevant to litigants' claims [204]. That orientation was reflected in rules compelling parties to disclose all evidence in their

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203. For a general overview, see S. McCaffrey and T. Main, *Transnational Litigation in Comparative Perspective* (2010), at 436-438.

204. *Flight* v. *Robinson* (1844), 50 ER 9, at p. [13]. For a similar statement of the US approach, see *Hickman* v. *Taylor*, 329 US 495 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation").

possession related to the claims at issue, even when that evidence was adverse to their interests. Over time, concern that discovery processes had become excessive led to proportionality requirements and some other curtailments of rights to discovery [205]. Nevertheless, the general orientation toward discovery in the United Kingdom, as in other common law systems, remains expansive [206].

Civil law systems, in contrast, traditionally adhered to the principle that parties could not be compelled to produce evidence adverse to their own interests (*nemo tenetur edere contra se*). Accordingly, duties of disclosure were the exception, not the rule. Adherence to that principle has weakened quite significantly in recent decades. For instance, both EU law and the procedural codes of some civil law systems now permit plaintiffs to engage in broader discovery when relevant evidence is likely to be within the control of the defendant, as in antitrust litigation [207]. Nonetheless, overall, procedural reform in such systems has led primarily to an expansion of the judicial power to require production of evidence where deemed necessary, not to a wholesale introduction of common-law style discovery rules. As a result, despite some convergence toward the centre, significant differences persist across systems regarding the actors charged with collecting evidence, the scope of discoverable evidence, and the timing of discovery, among other matters.

Even among common law systems, the United States stands apart as the most expansive in its approach to the development of evidence via mandatory discovery [208]. Consequently, litigation in US fora has generated the most conflict in cross-border discovery. For that reason, the following overview focuses on the US approach, comparing it with the approach that civil law systems have generally adopted.

(i) *Scope of discovery*

Consistent with the overall theoretical orientation described above, the US discovery framework is shaped in part by the general premise

205. See, e.g., H. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) (proposing reform).

206. See *Davies* v. *Eli Lilly*, [1987] 1 WLR 428 (describing this "card on the table" approach).

207. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Chapter II (Disclosure of Evidence).

208. For a brief overview comparing the US system with other common law systems, see G. Hazard, "From Whom No Secrets Are Hid", 76 *Texas Law Review* 1665 (1998).

"that fair, effective dispute resolution requires giving litigants the legal power to obtain largely unhindered access to all information that could be relevant to the resolution of their dispute" [209]. The US approach to pleadings has also contributed to the nature and extent of discovery. Since the 1930s, US rules of procedure have required "notice pleading": a "short and plain" statement articulating the elements of a claim entitled to relief [210]. This form of pleading does not require extensive factual detail; rather, it must contain non-speculative allegations sufficient to put each party on notice of the claims and defences that the other will assert [211]. This system has been modified somewhat by recent Supreme Court cases encouraging early termination of claims that are implausible or pled in a conclusory manner [212]. Nevertheless, the overall de-emphasis of the pleading stage indicates that pleadings do not play a significant role in developing the claims or narrowing the issues for trial [213]. Broad discovery is therefore necessary, for that is the stage at which claims will be developed and supported.

The scope of discovery available to US litigants is remarkably expansive. Federal Rule of Civil Procedure 26 *(b)* (1) provides the starting point:

> "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . Information within this scope of discovery need not be admissible in evidence to be discoverable."

The rules of civil procedure provide various avenues by which a litigant may obtain discovery, including document requests; written interrogatories; and depositions of parties as well as non-party witnesses. A party may also demand physical examination of property or things relevant to the litigation. Both parties and non-parties may be required to produce documents in their possession or control, regardless

209. G. Born and P. Rutledge, *International Civil Litigation in United States Courts* (5th ed., 2011), at 965.

210. FRCP 8 *(a)* (2).

211. *Bell Atlantic Corp.* v. *Twombly*, 550 US 544 (2007), 555.

212. *Ibid.*; *Ashcroft* v. *Iqbal*, 556 US 662 (2009).

213. *Bell Atlantic Corp.* v. *Twombly*, 550 US 544 (2007), at 575 (Stevens, J., dissenting) ("Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of a trial").

of where the documents are physically located. Similarly, parties may depose witnesses wherever subpoena power may be gained over them.

Parties may obtain discovery of the existence and description of documents relevant to the dispute, even if they cannot at the point of making the request identify such documents with particularity [214]. And parties may obtain any non-privileged materials relevant to the subject matter of the litigation, including materials that are not themselves admissible at trial, as long as the discovery leads to admissible evidence [215]. It is these aspects of the discovery process that are often characterized as permitting "fishing expeditions" whereby parties with no credible evidence hope to find some during discovery, or, even worse, harass an adversary into settlement. Such "fishing expeditions" are incompatible with the tone, nature, and development of evidence in civil law systems [216].

(ii) *Who gathers evidence*

In the United States, the process of evidence gathering is largely in the hands of the litigants, not of the court. The rules of civil procedure provide for a basic and fairly extensive level of initial disclosure that each party must provide without awaiting a request from opposing counsel [217]. Following this stage of mandatory disclosure, parties may obtain additional discovery by making demands directly on the opposing party (for instance, through a request for documents, interrogatories on a party, or the deposition of witnesses). The process was designed to involve the court as little as possible. For many decades, judicial intervention in discovery was limited to scheduling and, when necessary, resolving disputes over issues such as whether particular documents are protected by a privilege.

A series of procedural reforms that took place in the 1980s significantly expanded judicial control over the process [218]. The resulting amendments to the procedural rules, whose stated objective was

214. FRCP 26 *(b)*. They may then request production of the documents or seek to obtain them by means of written interrogatories.

215. FRCP 26 *(b)* (1). In this respect US procedure differs markedly from that of most civil law systems, which restrict documentary discovery to documents that are themselves evidence of the transaction or issue in question.

216. See Lowenfeld, *supra* footnote 111, at 142 n. 18.

217. Fed. R. Civ. P. 26 *(a)* (1).

218. See in particular Notes of Advisory Committee on Federal Rules of Civil Procedure – 1983 Amendment.

to cut back on discovery abuse, authorized judges more actively to manage the discovery process, including by protecting parties against disproportionate discovery requests. However, the mechanics of discovery – the issuance of requests, taking of depositions, production of documents, and so forth – remain in the control of the litigants. As Professor Gerber notes, the extent to which this is true in the United States is unique.

> "In the U.S., attorneys have virtually sole responsibility for fact investigation and fact presentation . . . They are authorized to depose witnesses, examine documents and demand answers to written interrogatories, and the state enforces compliance with their demands for information. Thus the state clothes attorneys with extensive authority to coerce private conduct merely because they represent parties in pending litigation. Such fact investigation authority granted to attorneys in the U.S. appears to exceed that granted by any other state." [219]

In civil law jurisdictions, by contrast, the development of evidence rests in the hands of the court. The parties may not demand the production of evidence directly; rather, they must request the court to order such production.

(iii) *Timing of discovery*

In civil law systems, the development of evidence is generally an iterative process. The judge in a particular case may order a series of individual hearings to examine witnesses or consider documentary evidence. A hearing might generate orders to produce additional evidence, which would then be assessed in a subsequent session. Over time, the judge would determine the legal and factual issues to be resolved at a final hearing. In the event that the final hearing generated some surprise that required the consideration of additional evidence, the judge could simply stop the hearing and order the evidence to be produced.

In a system that uses juries, the sequence of litigation is more rigid. Since a jury's participation occurs during a single continuous trial, it is virtually impossible to develop additional evidence once trial has

219. D. Gerber, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", 34 *American Journal of Comparative Law* 745 (1986), at 752.

commenced. Rather, the parties must gather all the evidence they need to present their cases in the pre-trial phase [220]. In the United States, one of the purposes of the expansive pre-trial process is to ensure that all issues of fact be fully clarified prior to trial. The overall effect of the system is to incentivize parties to over-request evidence, since if they miss something they will be unable to go back during the trial phase to request additional discovery [221].

(c) *The mechanics of discovery in public enforcement*

Overall, there are fewer differences among legal systems in the process of developing evidence for use in public enforcement proceedings. In all systems, regulatory agencies enjoy the authority to demand the production of evidence in investigations and enforcement proceedings, and to compel such production where necessary, subject to applicable privileges. In the United States, relevant regulatory statutes confer this authority. The Antitrust Civil Process Act, for instance, authorizes the Attorney General and the head of the Justice Department's Antitrust Division to require targets to produce documentary evidence, respond to written interrogatories, and provide witness testimony [222]. The Securities Exchange Act, similarly, authorizes the SEC to demand written statements, the production of books and records, and witness testimony [223]. Should the recipient of such a demand fail to comply, the agency may apply for a court order enforcing its demand.

Regulatory agencies have great latitude in exercising this authority. They need not establish the relevance of the evidence sought to a particular claim as the litigation rules require. In this sense, the agencies' civil investigative demands more closely resemble the subpoenas issued by grand juries in criminal investigations [224]. The Supreme Court made this comparison in 1950:

> "Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing

220. See G. Hazard, "Discovery and the Role of the Judge in Civil Law Jurisdictions", 73 *Notre Dame Law Review* 1017 (1998), at 1019-1022.

221. Moreover, summary judgment may be entered against a party before trial if the court concludes that the party has failed to develop sufficient evidence presenting an issue of fact.

222. 15 USC, §§ 1312-1313.

223. 15 USC, § 78u(b).

224. See G. Hughes, "Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Compulsory Process", 47 *Vanderbilt Law Review* 573 (1994).

> that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probably violation of the law." [225]

Accordingly, in public proceedings, "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant" [226]. In some cases, nevertheless, the statutes authorizing agencies to develop evidence instruct them – at least to the extent practicable – to adhere to the standards applicable to discovery requests in civil litigation [227].

2. *Conflict of discovery procedures in cross-border regulation*

As long as public proceedings or private cases involve no foreign elements, the differences across countries regarding the discovery of evidence are unproblematic. In the regulation of transnational economic activity, however, they become salient. An entity seeking to enforce national regulatory law – whether a public agency or a private litigant – may seek access to documents located in another country, or the testimony of an individual located in another country. The discovery of evidence located outside the forum State raises questions regarding the limits of a State's enforcement jurisdiction [228].

Chapter III discussed some ways in which the traditional understanding of the territoriality principle has been relaxed with respect

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225. *United States* v. *Morton Salt Co.*, 338 US 632, at 642-643 (1950).

226. *Ibid.* at 652.

227. In the case of antitrust investigations, for instance, the applicable provision states that demands should not require the production of evidence that would be protected from disclosure under the Federal Rules of Civil Procedure, at least to the extent that applying those standards "is appropriate and consistent with the provisions and purposes" of the public investigation process. 15 USC, § 1312(c)(1)(B).

228. The Restatement (Fourth) of Foreign Relations Law provides the following definition: "Jurisdiction to enforce concerns the authority of a state to exercise its power to compel compliance with law." § 432, cmt. *a*. This form of jurisdiction is typically exercised by law enforcement officers, often at the direction of courts. Examples relevant to this discussion include the service of process, taking depositions, and executing orders for the production of documents. See § 432, Reporters' Notes 1.

to legislative jurisdiction. (Most importantly, contemporary practice extends legislative jurisdiction to encompass activity occurring outside the borders of the regulating State, to the extent that it causes harmful effects within that State.) No similar development has occurred regarding enforcement jurisdiction. As a leading treatise puts it,

> "the unilateral and extra-territorial use of enforcement jurisdiction is impermissible. . . . The governing principle of enforcement jurisdiction is that a state cannot take measures on the territory of another state by way of enforcement of its laws without the consent of the latter." [229]

Thus, an act taken within another State to procure evidence – for example, the seizure of documents, or the deposition of a witness – exceeds the enforcement jurisdiction of the regulating State if it is done without the consent of the jurisdiction where the documents are housed or the witness resides [230].

However, this limit on a State's enforcement jurisdiction does not prevent it from acting within its own borders in litigation involving foreign elements [231]. Thus, a regulatory agency may order a local corporation to present one of its foreign officers for an interview, or a court may order a local litigant to produce documents located overseas. If the party does not comply, a State may also enforce such orders by various means against persons and entities over whom the State's courts have personal jurisdiction [232]. For instance, the agency could make a finding of fact adverse to the corporation's position, or the court could hold the litigant in contempt of court and impose financial sanctions.

This framework generates both gaps and conflicts in cross-border proceedings.

(a) *Enforcement gaps*

As indicated above, in situations where a demand for evidence is ignored, the authority of a court to compel compliance is limited to

229. James Crawford, *Brownlie's Principles of International Law* (8th ed., 2012), at 478-479.

230. See Restatement (Fourth) of Foreign Relations Law, § 432 *(b)* and Reporters' Notes 1 (stating this as a principle of customary international law).

231. Crawford, *supra* footnote 229, at 479 ("The principle of territoriality is not infringed just because a state takes action within its own borders with respect to acts done in another state").

232. See *Société Internationale* v. *Rogers*, 357 US 197 (1958); *In re Grand Jury Proceedings*, 740 F. 2d 817 (11th Cir. 1984).

entities over which it has personal jurisdiction. Sometimes, however, the evidence sought is controlled by a person or entity not subject to personal jurisdiction in the courts of the regulating State : for instance, a foreign non-party witness, or a foreign company unaffiliated with the target of investigation. In such cases, the regulating State lacks the authority to compel discovery. Absent mechanisms providing for assistance among States, this creates an enforcement gap.

Some States have created formal unilateral mechanisms for providing such assistance. For example, the United States has enacted a law authorizing its federal courts to provide assistance in gathering evidence for use in foreign tribunals. The relevant provision states that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . ." [233]. The Supreme Court has confirmed that such assistance is available in connection with administrative proceedings as well as ordinary litigation, and any interested person – including a private litigant – may request it directly of the appropriate US court [234]. Moreover, the provision authorizes the production even of evidence that could not be discovered under applicable procedural law in the relevant foreign jurisdiction [235]. However, it does exclude materials privileged under that jurisdiction's law.

In most countries, unilateral assistance of this type is provided on an *ad hoc* basis through diplomatic channels. In the case of public enforcement investigations or proceedings, this would involve direct requests for assistance by the relevant agency. In the case of ordinary civil litigation, this takes place by means of letters rogatory, which are simply formal requests for assistance [236]. They are generally transmitted by a country's foreign ministry to its counterpart in the relevant foreign State, and from there to a court possessing enforcement jurisdiction over the individual to whom the request is directed. The fulfilment of such requests is entirely optional.

(b) *Enforcement conflicts*

Due to the procedural differences outlined above, orders issued by a regulating State to parties within its jurisdiction may require action in

233. 28 USC, § 1782 *(a)*.
234. *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 US 241, 249 (2004).
235. *Ibid.* at 260.
236. 28 USC, § 1781.

another State that is incompatible with that State's law. This creates an enforcement conflict. As past practice illustrates, enforcement conflicts arise in various forms.

Sometimes a discovery request seeks the production of evidence whose disclosure is illegal under the law of the State in which the evidence is located. This may be because the requested evidence is privileged under that law, or is of a type that receives special statutory protection. The perennial collisions between demands for the production of bank records and foreign bank secrecy laws best illustrate this form of conflict [237]. Other discovery requests are simply incompatible with the general procedural law of the State in which the evidence is located. Here, the paradigmatic illustration is the dispute over the availability of pre-trial discovery, which has been viewed in many legal systems as inconsistent with local rules regarding the limits of discoverable evidence. Finally, discovery requests may be perceived as infringing upon the "judicial sovereignty" of the State in which the evidence in question is located. The latter form of conflict is discussed in detail in Chapter V.

Because discovery in the US system is significantly more expansive than in other legal regimes, procedural conflict in the area of discovery has historically centred around US practices. Parties to US civil litigation routinely refused to comply with orders to produce evidence located abroad, on the grounds that doing so would violate foreign law. Similarly, courts in foreign States whose discovery processes differ substantially from US procedures frequently refused to render discretionary assistance to their US counterparts. And attempts by US regulatory agencies to obtain documents located abroad were often frustrated by the refusal of foreign authorities or courts to render assistance [238].

Even more pointedly, many jurisdictions adopted blocking statutes designed to thwart US-style discovery of evidence [239]. Unlike bank

237. For a description of past conflicts, see Lowenfeld, *Quest for Reasonableness*, *supra* footnote 111, at 166-179. Other examples of laws generating this kind of conflict are data protection laws, which may prohibit the disclosure of data identifiable to an individual, and State secrecy laws.

238. See accounts in Lowenfeld, *supra* footnote 111, at 166-179; Born and Rutledge, *supra* footnote 209, at 965-973.

239. Although such blocking statutes were applied most often in civil litigation, they also apply to regulatory enforcement. For a discussion of blocking statutes generally, see J. Griffin, "United States Antitrust Laws and Transnational Business Transactions: An Introduction", 21 *The International Lawyer* (1987), at 308-309; Born and Rutledge, *supra* footnote 209, at 972-973.

secrecy statutes and other laws protecting certain kinds of information from disclosure for any purpose, these blocking statutes are specifically intended to prevent disclosure of evidence for use in foreign litigation. Some of these statutes were enacted as a response to lawsuits in other countries that involved a particular local industry, and prohibit disclosure only of information relating to that industry [240]. Others block the production of any evidence for use in foreign proceedings, to the extent that it is not ordered within the context of a treaty framework or pursuant to local procedural rules. In 1980, for example, France enacted a statute that makes it unlawful for any French citizen or resident to "request, seek, or disclose information, written, orally, or in any other form, that is directed toward establishing evidence in view of legal or administrative proceedings abroad" unless permitted by an international treaty [241]. Legislation of this kind is regularly invoked to prohibit persons in the relevant jurisdiction from complying with an order of a foreign court or regulatory authority to provide documents or information.

C. Mitigating Conflicts in Cross-border Discovery

As in the case of substantive conflicts, a variety of measures have been developed to mitigate the consequences of this form of procedural conflict.

1. Attempts to harmonize applicable procedural law

One effort to resolve conflict in the realm of private litigation was the ambitious UNIDROIT/American Law Institute project on transnational rules of civil procedure. This project was launched in the late 1990s, and aimed to develop procedural rules, including those governing the gathering of evidence, that would reconcile some of the major differences among national procedural systems [242]. The project concluded in 2004 with the adoption of the Principles of

240. See Lowenfeld, *supra* footnote 111, at 210.

241. Law 80-538 of 16 July 1980 on the Disclosure of Documents and Information.

242. A Co-Reporter for the project described its goal as follows: "to bridge the gap between common law and civil law traditions and to draft a code which combines the most attractive attributes of the two systems and avoids the hardships of litigation under a foreign procedural system". R. Stürner, "The Principles of Transnational Civil Procedure: An Introduction to Their Basic Conceptions", 69 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2005), at 204.

Transnational Civil Procedure, a set of standards for the adjudication of cross-border commercial disputes [243], along with the publication of a set of accompanying rules. The Principles were intended to serve as a model for the implementation of new procedural rules in national legal systems. However, in several areas, including the section on "access to information and evidence", the final provisions did not completely resolve the debates among participating countries. In particular, doubts remained that the proposed evidence rules would prove satisfactory both in Europe and in the United States. To date, the principles have not been adopted in national legal systems, and so the instrument has played no significant role in mitigating conflict [244].

2. *Establishing formal frameworks for reciprocal assistance*

(a) *In public enforcement*

As discussed in Chapter III, many regulatory agencies, including those charged with the enforcement of competition law, tax law and securities law, have executed series of bilateral memoranda of understanding with their counterparts in other jurisdictions. These agreements are entered into pursuant to authority granted in the relevant regulatory statutes, which generally permit agencies to provide assistance to foreign authorities on a reciprocal basis [245].

These agreements are intended to enhance co-operation and co-ordination among agencies as they engage in cross-border enforcement proceedings. Some agreements do little more than articulate the general goal of increased co-operation in the development and implementation of competition policy. The recent Memorandum of Understanding on Antitrust Cooperation between South Korea and the United States, for example, states that

> "The competition authorities intend, as appropriate, to share information that facilitates the effective application of [their competition] laws and promotes better understanding of each other's competition enforcement policies and activities, to the

243. The project deliberately left the specific definition of "commercial" – and thus the precise scope of the principles' application – up to individual States. See Principles P-B.

244. UNIDROIT has recently launched an initiative that uses the principles as a foundation for procedural reform in particular regions.

245. See, e.g., 15 USC, § 78n(a)(2) (securities laws) and 15 USC, § 6201-62 (International Antitrust Enforcement Assistance Act).

> extent compatible with their respective legal systems and important interests and within their reasonably available resources." [246]

Other bilateral agreements, however, include more specific provisions addressing assistance in procuring evidence during individual enforcement investigations. The agreement between antitrust authorities in Mexico and the United States [247], for instance, requires each agency to notify the other if it intends to engage in enforcement activity "that may affect the important interests" of the other State. Such activity is defined to include "the seeking of information located in the territory" of the other State. Further provisions provide specific guidelines on the substance and timing of such notification

> "[w]hen the competition authorities of a Party request that a person provide information, documents or other records located in the territory of the notified Party, or request oral testimony in a proceeding or participation in a personal interview by a person located in the territory of the notified Party" [248].

Additionally, the agreement encourages positive co-operation between the States in the discovery of evidence, providing that

> "[e]ach Party's competition authorities will, to the extent compatible with that Party's laws, enforcement policies and other important interests[,] assist the other Party's competition authorities, upon request, in locating and obtaining evidence and witnesses, and in obtaining voluntary compliance with requests for information, in the requested Party's territory" [249].

In some areas of law, transnational regulatory networks have adopted multilateral instruments including similar provisions. IOSCO's Multilateral Memorandum of Understanding [250], for instance, establishes a robust framework for mutual assistance in the enforcement of securities

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246. Memorandum of Understanding on Antitrust Cooperation between the United States Department of Justice and the United States Federal Trade Commission, of the One Part, and the Korea Fair Trade Commission, of the Other Part, 8 September 2015, Section I.1.

247. Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of Their Competition Laws, 2000.

248. *Ibid.* at Art. II.4.

249. *Ibid.* at Art. III.3 *(a)*.

250. International Organization of Securities Commissions, Multilateral Memorandum of Understanding concerning Consultation and Cooperation and the Exchange of Information (2012).

laws. Any party to the MMOU may request assistance from any other party in obtaining information, documents, or testimony relevant to a securities investigation. Upon receiving such a request, the requested party may turn over information already within its possession. In addition, pursuant to a provision entitled "Execution of Requests for Assistance", it may take steps to obtain documents as well as the testimony of individuals located within its borders. That provision provides in part as follows:

> "*(a)* Information and documents held in the files of the Requested Authority will be provided to the Requesting Authority upon request.
>
> *(b)* Upon request, the Requested Authority will require the production of documents identified in 7 *(b)* (ii) from (i) any Person designated by the Requesting Authority, or (ii) any other Person who may possess the requested information or documents. Upon request, the Requested Authority will obtain other information relevant to the request.
>
> *(c)* Upon request, the Requested Authority will seek responses to questions and/or a statement (or where permissible, testimony under oath) from any Person involved, directly or indirectly, in the activities that are the subject matter of the request for assistance or who is in possession of information that may assist in the execution of the request.
>
> *(d)* Unless otherwise arranged by the Authorities, information and documents requested under this Memorandum of Understanding will be gathered in accordance with the procedures applicable in the jurisdiction of the Requested Authority and by persons designated by the Requested Authority. Where permissible under the Laws and Regulations of the jurisdiction of the Requested Authority, a representative of the Requesting Authority may be present at the taking of statements and testimony and may provide, to a designated representative of the Requested Authority, specific questions to be asked of any witness."

These sorts of co-operative assistance agreements do not eliminate all disputes over discovery processes. First, they provide that evidence will be gathered in accordance with local procedure [251]. In addition,

251. See, e.g., para. *(d)* of the excerpted section.

they do not require States to fulfil requests when doing so would violate domestic law or public policy [252]. As a result, the MOUs would not resolve a conflict caused by a State's demand for the production of documents protected by the laws of the requested State. Moreover, they do not create binding obligations that would displace otherwise applicable laws governing the scope of permissible discovery.

Nevertheless, co-operation agreements of this kind are widely viewed as having improved the effectiveness of discovery processes in public regulation. The number of requests for assistance filed each year under such instruments continues to grow, and regulatory commissioners around the world credit these instruments with smoothing over many difficulties related to the discovery of evidence. In some circumstances, they have also been utilized to resolve particular conflicts between jurisdictions. In the mid-1980s, for example, a memorandum of understanding was concluded by Canadian and US antitrust regulators that reflected a compromise: the United States agreed more actively to consider Canada's interests when pursuing enforcement proceedings, and Canada agreed to relax its restrictions on access to evidence located within its borders [253].

In cases involving regulatory violations that would subject the actor to criminal prosecution, regulatory agencies may also be able to utilize treaties designed to foster mutual legal assistance in criminal matters (MLATs). These treaties simplify the procedures for initiating and responding to requests for enforcement assistance by establishing a central authority within each member State, facilitating direct exchanges of information. They specifically permit authorities in the requested State to order the production of records and the taking of testimony within their jurisdiction for use in the requesting State. Unlike the MOUs, these instruments obligate member States to provide assistance when the relevant criteria are met [254]. They too have been

252. The IOSCO MMOU, for instance, provides that a request for assistance may be denied "where the request would require the Requested Authority to act in a manner that would violate domestic law", or "on grounds of public interest or essential national interest". Section 6 *(e)*.

253. G. Dyal, "Canada-United States Memorandum of Understanding re Application of National Antitrust Law: New Guidelines for the Resolution of Multinational Antitrust Enforcement Disputes", 6 *Northwestern Journal of International Law and Business* 1065 (1985).

254. Common criteria are that the requesting party must have a reasonable suspicion that a criminal offence has been committed; that the offence is a criminal violation in both jurisdictions; and that the offence warrants compulsory measures under the law of the requested State.

quite effective in resolving certain procedural conflicts. The MLAT between the United States and Switzerland, for example, provided for the waiver of Swiss bank secrecy laws in certain situations. It thereby provided the US Securities and Exchange Commission with access to some previously unavailable forms of account information for use in insider trading prosecutions [255]. Such legal assistance treaties vary in form, however, and some exclude certain types of offences – including antitrust-related offences – from their scope. They have therefore been utilized more frequently in some areas of regulation, such as insider trading, than in others.

(b) *In private enforcement*

As noted above, courts seeking assistance in gathering evidence abroad in the past had to rely upon letters rogatory. The resulting process was cumbersome and time-consuming, and often failed to yield evidence in a form suitable for use in the requesting court. As a result of these inefficiencies, States launched an initiative to develop a multilateral solution for the production of evidence in cross-border litigation. This led to the adoption of the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters [256]. The convention established certain procedures, including a "letter of request" procedure, intended to simplify and liberalize the process by which courts of one nation could obtain evidence located in another for use in civil cases [257]. Its adoption was met with great optimism as to its potential for reducing conflicts of sovereign authority. At least with respect to the sharpest conflict, however, which is that between the United States and other regimes, it has produced only limited success.

There are more reasons for this than can be discussed here. Suffice it to say that while the Hague Convention did liberalize then-existing mechanisms for the cross-border taking of evidence, its procedures remained substantially more restrictive than US procedural rules on discovery. Furthermore, many States that adopted the Convention opted out of some of its more liberal provisions, including those that would

255. C. Greene, "International Securities Law Enforcement: Recent Advances in Assistance and Cooperation", 27 *Vanderbilt Journal of Transnational Law* 635 (1994)

256. 23 *UST* 2555, *TIAS* No. 7444. The Convention was opened for signature in 1970 and ratified by the United States in 1972.

257. For a brief description of the Convention's provisions, see A. Heck, "US Misinterpretation of the Hague Evidence Convention", 24 *Columbia Journal of Transnational Law* 231, 233-237 (1986).

otherwise permit some extent of pre-trial discovery. Finally, in 1987, the US Supreme Court held that Convention procedures were optional, and that courts were free in each case to decide whether evidence should be gathered under its procedures or under US state or federal procedural rules [258]. Unsurprisingly, practice in US lower courts reflects a continued preference for application of US state or federal procedural rules. For these reasons, transatlantic evidence gathering in US civil litigation proceeds largely outside the Hague Convention framework. Of course, if the evidence sought is controlled by a party outside the US court's jurisdiction, then Convention procedures (or a traditional letter rogatory) must be used.

3. Accommodating foreign interests in the application of local procedural law : the role of comity

(a) *In public enforcement*

Regulatory agencies are mindful of the reciprocal relationships necessary for effective cross-border enforcement. As a consequence, even when no formal co-operation agreement is in place, they consider the interests of other States in carrying out their investigations. The US antitrust enforcement guidelines, for instance, warn that "unilaterally collecting documents or information from individuals or entities located abroad can adversely affect law enforcement relationships with foreign countries", and therefore caution enforcement agencies to take the interests of foreign States into account [259]. Nevertheless, in cases that present a square conflict between a US regulatory interest and foreign non-disclosure laws, agencies do not hesitate to seek the assistance of courts in order to compel production [260].

(b) *In private enforcement*

In circumstances in which a discovery order is likely to cause conflict with another State, a court may unilaterally accommodate that State's interests. In the United States, for example, courts frequently

258. *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court*, 476 US 1168 (1986). Many other States parties to the Convention considered its procedures to be exclusive.

259. DOJ and FTC Antitrust Guidelines for International Enforcement and Cooperation, at 40.

260. See, e.g., *SEC* v. *Banca Della Svizzera Italiana*, 92 FRD 111 (SDNY 1981).

invoke comity in determining whether or not to follow the optional Hague Convention procedures rather than ordering discovery under US procedural law. Similarly, when applying domestic procedural law, they consider comity in deciding whether to order production of evidence located abroad, and, if so, how to craft the order. The Restatement (Fourth) of Foreign Relations Law sets forth a number of factors courts are expected to consider in deciding whether to issue an order directing discovery of evidence overseas, and in defining the scope of any such order:

> "In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court in the United States should take into account: the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." [261]

This sort of generalized comity analysis is compatible with the domestic rule of procedure stating that discovery must be "proportional to the needs of the case" [262].

As in the context of substantive conflicts, there were some efforts in the past to harden this type of unilateral comity-based accommodation into a requirement that courts balance domestic and foreign interests when the application of US rules would generate procedural conflict. The Restatement (Second) of Foreign Relations Law, for instance, required a US court to ascertain and weigh foreign interests before exercising its enforcement jurisdiction [263]. Although a handful of courts subscribed to this interest balancing approach, the majority of courts rejected it outright, concluding that the courts are not in a position to define and balance competing State interests. The classic articulation of the latter position appears in one of the uranium cartel cases:

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261. Restatement (Fourth) of Foreign Relations Law, § 426, comment *a*. These factors, which were also included in the previous Restatement, were endorsed by the Supreme Court in the *Aérospatiale* case, *supra* footnote 258.

262. See, e.g., *Argentina* v. *NML*, 134 S. Ct. 2250, 2258 n. 6 (2014).

263. American Law Institute, Restatement (Second) of Foreign Relations Law, § 40 (1965).

> "Westinghouse seeks to enforce this nation's antitrust laws against an alleged international marketing arrangement among uranium producers, and to that end has sought documents located in foreign countries where those producers conduct their business. In specific response to this and other related litigation in the American courts, three foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to those same documents. It is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions." [264]

Courts also invoke comity in determining whether to impose sanctions for non-compliance with a discovery order on the basis of a conflict with foreign law. The primary question in these cases is simply whether or not a party has made a good-faith effort to comply with the discovery order in the face of such a conflict [265]. However, courts do to some extent consider the interests of the relevant foreign State. This approach is reflected in the recently completed Restatement (Fourth) of Foreign Relations Law. In deciding on enforcement sanctions, a court is expected to take into account "the likelihood of severe sanctions for failing to comply with foreign law and the good-faith efforts of the person to comply with the order in light of obstacles imposed by foreign law" [266]. The interests served by the foreign law in question are generally part of that analysis [267].

4. Conclusion

The mechanisms described above have gone some way to mitigate conflict in the cross-border discovery of evidence. However, that process continues to present significant concerns. Disputes regarding the availability and scope of discovery orders impose additional costs and delays in international litigation. In addition, some conflicts simply remain intractable, which can impose serious burdens on litigants. As the Restatement (Fourth) recognizes,

> "[a] court in the United States may impose sanctions on a person who fails to comply with an order to produce evidence or to

264. *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1148 (ND Ill. 1979).
265. *Societe Internationale* v. *Rogers*, 357 US 197 (1958).
266. Restatement (Fourth) of Foreign Relations Law, §426 (3).
267. *Ibid.*, Reporters' Notes 5 (quoting *Societe Internationale*'s reference to "the nature of the foreign law" as part of an interest-balancing approach).

> submit to a compulsory interview, even if complying with the order would violate foreign law" [268].

Conflicts stemming from differences in the discovery process across regimes can affect other areas of procedure as well. Some commentators, for example, have suggested that a foreign court might refuse to recognize a judgment resulting from proceedings that utilized discovery procedures contrary to public policy in the foreign State [269].

In public enforcement, too, friction between regimes regarding access to evidence can hamper investigations and other regulatory processes. One much-discussed episode illustrating this problem involved the efforts of US securities regulators to procure the work papers of Chinese accounting firms in the course of investigating Chinese issuers [270]. Under the Sarbanes-Oxley Act, any accounting firm registered with the US Public Companies Accounting Oversight Board must produce its work papers upon the request of US regulators [271]. In one case involving the investigation of a Chinese company suspected of securities fraud, the SEC issued an administrative subpoena pursuant to this authority. The subpoena ordered the company's auditor to produce relevant audit documents. The auditors refused on the ground that production would violate China's State Secrecy Law. Citing the importance of the work papers to its investigation, the SEC then sought an order to compel production [272]. The SEC's lawsuit was eventually dismissed after further negotiations among the SEC, the auditors, and Chinese regulators yielded production of many of the requested documents.

In a related episode, the SEC initiated an administrative proceeding to bar a group of China-based affiliates of Big Four accounting firms from practising before the Commission, on the ground that they had "willfully refused" to produce requested documents. There, too, the firms argued that doing so could subject them to the risk of prosecution under Chinese law [273]. They were nevertheless suspended from practice for six months.

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268. Restatement (Fourth) of Foreign Relations Law, § 426 (3).

269. See S. Baumgartner, "Understanding the Obstacles to the Recognition and Enforcement of US Judgments Abroad", 45 *New York University Journal of International Law and Politics* 965 (2013).

270. For an account of this episode, see Qingxiu Bu, "Suspension of Chinese Units of 'Big 4' Audit Firms: The Question of Moral Turpitude", in P. Vasudev and S. Watson, eds., *Global Capital Markets: A Survey of Legal and Regulatory Trends* (2017), 35-61.

271. 15 USC, § 7216 *(b)* (as amended); Rule 106 *(b)*.

272. *Securities and Exchange Comm.* v. *Deloitte Touche Tohmatsu CPA Ltd.*, 940 F. Supp. 2d 10 (DDC 2013).

273. *In the Matter of BDO China Dahua CPA Co., Ltd.*, Release No. 553, 2014.

On the other side of the coin, complying with the requests of public agencies to produce evidence can have negative consequences for the recipients of subpoenas. In one high-profile case, the Privacy Commissioner of Canada initiated a complaint against SWIFT, a co-operative society providing secure messaging services to financial institutions. SWIFT is governed by Belgian law, and has operations in Belgium and the United States as well as Canada. In response to subpoenas issued by the US Department of Treasury, which was investigating possible methods of terrorist financing, SWIFT provided data that included personal information originating with Canadian financial institutions. The Commissioner alleged that this act had violated Canadian privacy law, although it was lawful under American rules (and required by the subpoenas). Following a full investigation, the Commissioner ultimately concluded that SWIFT had not in fact violated Canadian law [274].

In sum, even though the mechanisms to reduce discovery-related conflict are more effective in public regulation than in civil litigation, challenges remain.

D. Conflicts in Aggregate Litigation

1. A comparative look at the function of group litigation

The classic form of litigation, in which a single plaintiff asserts a substantive legal right against a single defendant, is ill suited to address certain types of claims. For instance, it is an inefficient way to compensate multiple plaintiffs in situations where the defendant's activity caused widespread harm. In such cases, requiring a series of individual lawsuits would burden courts, multiply litigation costs, and create the risk of inconsistent outcomes. And in situations where an individual plaintiff has suffered only a small financial loss, traditional litigation may not be financially viable, precluding the possibility of any recovery. As a result of these and other deficiencies, all modern legal systems include procedures that deviate to some extent from the classic model. Some such procedures are common, such as joinder rules that can be used on a permissive basis when individual claims arise out of a single occurrence and present common issues of law or fact. Others, however, are not. Class actions under US law fall into the latter category.

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274. *Privacy Commissioner of Canada* v. *SWIFT*, Report of Findings, 2 April 2007.

(a) *The basic class action procedure*

Group litigation in the United States proceeds pursuant to Federal Rule of Civil Procedure 23. That rule creates a procedural mechanism that allows for representative litigation in all substantive areas of law. It permits class actions not only for injunctive relief, but also for monetary damages. A plaintiff can seek to have its lawsuit certified as a class action on the basis that it presents questions of law or fact common to a group of additional plaintiffs so large that traditional joinder is impracticable. If it is successful, then that plaintiff, represented by class counsel, will litigate the claim on behalf of the entire class. Any settlement or judgment reached in the case will bind all other class members.

Two aspects of US class action practice distinguish it from forms of collective action more common in other legal systems. First, it is true representative litigation. Most other legal systems have rejected this form of action, in which one plaintiff can act for, and bind, class members who do not participate in the proceeding. That is partly because in many countries, "the fundamental model of litigation is still that of individuals pursuing the protection of individual rights against other individuals", because "only individuals are vested with a right of action for the protection of their own individual substantive rights" [275]. In systems based on that model, each individual must determine the disposition of his own particular claim, making representative litigation – in which one lead plaintiff makes decisions for all members of the class – impossible [276].

Second, the function of the US class action must be understood within the context of the regulatory role that civil litigation plays in the US system – a role that is not common in other legal systems.

As discussed in Chapter II, the US system intentionally utilizes ordinary civil litigation as a regulatory mechanism. That discussion focused on the concept of the private attorney general, as implemented in various statutes [277]. Importantly, though, it is not only in the context of regulatory statutes that one sees the characterization of litigation as

275. M. Taruffo, "Some Remarks on Group Litigation in Comparative Perspective", 11 *Duke Journal of Comparative and International Law* 405, 415-416 (2001).

276. See generally D. Fairgrieve and G. Howells, "Collective Redress Procedures – European Debates", 58 *International and Comparative Law Quarterly* 379 (2009) (surveying various procedures in European systems that would constrain the adoption of true representative litigation).

277. See discussion *supra* at Chapter II.H.

a regulatory instrument. This understanding is reflected in other areas of law as well.

Tort litigation, for instance, is routinely characterized in the United States as an instrument used to police corporate behaviour, not just to provide compensation to a plaintiff injured by a defendant's act [278]. The availability of punitive damages for certain types of tortious behaviour underscores this characterization: as the Supreme Court has explained, one of the core objectives of punitive damages is to deter the repetition of unlawful conduct [279]. Defenders of punitive damages in tort cases argue that the "multiplier" they provide, much like statutory treble damages, enhances deterrence by adjusting for circumstances in which the probability of detecting unlawful conduct is low. In addition, punitive damages increase deterrence by forcing corporations to bear the costs of the harm they inflict on society as a whole, not only on particular plaintiffs. In this sense, ordinary tort litigation is seen as part of the regulatory framework within which businesses operate.

Overall, as one commentator observed,

> "private civil litigation [in the United States has been] an important force in trying, however imperfectly, to keep the securities industry honest, protect against impure foods, enforce environmental laws, ferret out discriminatory practices, and uncover the deceit of rapacious corporations" [280].

The class action procedure under US rules has been designed to enhance the regulatory aspect of civil litigation. The regulatory function of the representative class action is particularly clear in the context of litigation involving low-value claims. Consider for instance a consumer class action alleging that a corporation's unfair pricing practices resulted in overcharges of US$15 per consumer. A class action brought by all affected consumers is not in any meaningful sense simply a joinder of individual claims, since there are no viable individual claims in such a case. As Judge Richard Posner famously remarked, "only a lunatic or a fanatic" would go to the trouble and expense of litigating a claim for a damages award that small [281]. Thus, collective litigation of this type is not a substitute for a series of individual private claims. Rather, it is a substitute for (or complement to) public regulation. It serves multiple

278. See S. Subrin and M. Woo, *Litigating in America* (2006).
279. *BMW of North America, Inc.* v. *Gore*, 517 US 559, 568 (1996).
280. S. Subrin and M. Woo, *Litigating in America* (2006), at 130.
281. *Carnegie* v. *Household Int'l, Inc.*, 376 F. 3d 656, 661 (7th Cir. 2004).

purposes: *(a)* providing compensation to the individuals harmed by unlawful conduct; *(b)* preventing unjust enrichment by ensuring that defendants disgorge unlawful gain; and *(c)* deterring future misconduct.

The interplay between public regulatory resources and the function of class actions in the United States has been well documented. As one empirical study concluded, "Diminished resources have been allocated to governmental enforcement of the laws that typically have spurred class action litigation – most notably antitrust, civil rights, and securities." [282]

This regulatory focus of group litigation has in the past been more or less unique to the United States. Many other systems do permit forms of collective litigation that serve a public function: for instance, litigation by consumer or trade associations, seeking injunctive relief on behalf of association members [283]. But few utilize class actions for regulatory purposes. Indeed, as commentators have emphasized, the notion that class actions for monetary damages could serve a regulatory function has in the past been rejected by most systems outside the United States [284].

(b) *Special characteristics of class actions under US law*

Two particular aspects of US procedure promote the use of class actions as a regulatory instrument: the rules regarding litigation financing and the opt-out mechanism. Both are quite different from the prevailing approaches in other legal systems.

(i) *The treatment of costs and expenses*

The baseline for litigation funding in the US system is the so-called "American rule", which dictates that each party must bear its own litigation costs, including attorney's fees. This rule helps incentivize

282. B. Garth, I. Nagel and S. J. Plager, "The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation", 61 *Southern California Law Review* 353 (1988), at 384-385.

283. See C. Hodges, "Western Europe: European Union Legislation", in D. Hensler, C. Hodges and M. Tulibacka, "The Globalization of Class Actions" (The Annals of the American Academy of Political and Social Science, 2009), Vol. 622, at 78 (providing an overview of such mechanisms in different European nations).

284. J. Walker, "Crossborder Class Actions: A View from across the Border", 2004 *Michigan State Law Review* 755 (2004), at 780-784 (discussing the widespread criticism of the "behaviour modification" model of class actions, in which collective litigation is used to deter wrongful conduct in the future).

litigation by eliminating the risk that an unsuccessful plaintiff would have to pay the defendant's costs. However, it does not permit a successful plaintiff to recoup its own costs, and thus does not eliminate the cost barriers that confront plaintiffs with limited financial resources. In many situations, particularly where large-scale violations give rise to low-value claims, these barriers would deter plaintiffs from pursuing litigation. A number of special rules mitigate this remaining disincentive. First, the private causes of action created by various regulatory laws often provide for one-way fee-shifting, under which a successful plaintiff may recover its costs from the defendant [285]. Second, the rules of professional responsibility allow attorneys to recover payment for their services in the form of contingency fees, significantly reducing the expense of an unsuccessful lawsuit. Third, under the "common fund" doctrine, successful plaintiffs in a class action may pay their attorneys' fees out of the recovery fund established for class members [286].

This combination of rules shifts the financing of class actions from plaintiffs to law firms. One account of the US system characterizes the impact of this shift as follows:

> "First, it enables clients who are dispersed or have suffered relatively small injuries to receive legal representation without incurring the substantial transaction costs of coordination. Absent such a system, a classic 'free rider' problem would arise because litigation is a form of 'public good' in which the benefits of an action accrue to persons who are not required to bear their share of the action's costs. This means that litigation would be predictably underfunded, from the clients' perspective, if the clients had to take collective action. Second, because the attorney as private enforcer looks to the court, not the client, to award him a fee if successful, the attorney can find the legal violation first and the client second. In principle, this system should encourage the attorney to invest in search costs and seek out violations of the law that are profitable for him to challenge . . . Thus, the attorney becomes a 'bounty hunter' – or, less pejoratively, an independent monitoring force – motivated to prosecute legal violations still unknown to prospective clients." [287]

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285. See *supra*, p. 295, and footnote 47.
286. See *Boeing Co.* v. *Van Gemert*, 444 US 472, 478-481.
287. J. Coffee, Jr., "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions", 86 *Columbia Law Review* 669 (1986), at 679.

Various aspects of this funding model are incompatible with the rules of professional responsibility in other systems. In many countries, for example, contingency fees are prohibited as contrary to public policy. Moreover, the vast majority of legal systems continue to follow the traditional "loser pays" approach to costs, which create a significant obstacle for potential class plaintiffs. As we will discuss below, this situation has changed significantly in recent years. Nevertheless, at least up to this point, new funding models in other systems have not disrupted the attorney-client relationship to the same extent as the American model, which turns the attorney into an entrepreneur.

(ii) *The opt-out*

As originally adopted, Rule 23 required absent plaintiffs affirmatively to seek inclusion in a proposed class. Practice under that rule generated concerns that too many meritorious claims remained unlitigated – especially "small claims by small people", as an advisory report put it, "who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step" [288]. In 1966, an amendment to the Federal Rules of Civil Procedure adopted Rule 23 in its current form. The major innovation of the 1966 amendment is its "opt out" mechanism. All persons who fall within the definition of the proposed class become members – and are thus bound by the outcome of the resulting litigation – unless they take affirmative steps to exclude themselves.

The rules require notice to be sent directly to potential class members whose identity is known. However, in situations where the identity of potential class members is unknown, a plaintiff seeking to represent a class may simply publish a notice designed to reach all potential members (for instance, by means of newspaper advertisements). This is common in consumer rights litigation, for instance, where the class typically includes all persons who purchased a particular product or service. All members of the defined class who do not opt out will be bound by any settlement or judgment obtained by the class representative, whether or not they actually read such a published notice [289]. The US Supreme Court has confirmed that adequate notice (even though merely constructive rather than actual), along with an opportunity to opt out, affords absent

288. See Wright, Miller and Kane, *Federal Rules of Civil Procedure*, at § 1787 (quoting Benjamin Kaplan).
289. FRCP 23 *(c)*.

plaintiffs the "minimal procedural due process protection" to which they are entitled [290].

The introduction of the opt-out mechanism increased the likely size of classes, and therefore the likely size of eventual awards. This made class litigation more attractive to plaintiffs and, more importantly, to the attorneys who financed such litigation. Class actions have flourished in areas including environmental law, labour law, securities law, and competition law.

As noted above, many legal systems historically rejected representative litigation entirely on the grounds that no person could dispose of another's legal claim. Even systems that adopted procedures for representative litigation, however, tended to permit the certification of classes only on an opt-in basis. Outside the United States, the disposition of an individual's legal claim without his actual knowledge is widely viewed as a failure of due process.

2. *Conflicts in class actions*

As in the discovery context, differences among collective action procedures only turn into conflict if two systems collide with each other, through litigation that touches foreign interests. Class litigation in the United States frequently involves foreign elements. A class action may be initiated against a foreign defendant, for instance, or may involve a plaintiff class that includes foreign members. Such cross-border cases involve several forms of conflict.

(a) *Forum shopping*

One point of contention regarding US class actions is the concern that they incentivize forum shopping by foreign plaintiffs. In some cases, plaintiffs outside the United States who have suffered harm as the result of particular transnational activity may have no actionable claim in their home jurisdiction. This might be the case if local law does not recognize a private right of action for the relevant violation, for instance. In others, they may have an actionable claim, but one that lacks some of the benefits that US-style class actions provide. Procedures in their home jurisdiction might not permit them to aggregate their claim with

290. See *Phillips Petroleum Co.* v. *Shutts*, 472 US 797, 814 (1985) (holding that this notification procedure provides sufficient protection to absent class members to satisfy constitutional due process requirements).

others in order to increase the possibility of a favourable settlement, for example, or to finance their claim by means of a contingency fee arrangement. In either situation, assuming that relevant jurisdictional requirements could be met, those plaintiffs might seek to join a class action in US court.

During the era of broad extraterritorial application of US regulatory law, representative plaintiffs in lawsuits initiated under US antitrust and securities laws frequently requested courts to certify "global" classes. In some cases, courts were willing to do so. For instance, in certain cases arising out of the activities of global price-fixing cartels, US courts certified classes that included not only US purchasers who bought price-fixed goods in US markets, but also foreign purchasers who bought those goods in foreign markets [291]. Similarly, in some cases arising out of securities fraud, US courts certified classes that included not only US investors who transacted on US exchanges, but also foreign investors who transacted on foreign ones [292].

This gave rise to significant conflict involving other regulatory regimes. The defendants in such cases pointed out that other countries had adopted significantly more restrictive approaches to collective action procedures – some rejecting group litigation entirely, and others limiting its use in various ways [293]. They objected that certifying global classes would permit the foreign plaintiffs to evade local remedial limitations, and unfairly increase the defendants' exposure to liability.

Foreign Governments objected as well, arguing that certifying global classes would permit foreign plaintiffs to do an "end run" around local procedural rules. They argued that the availability of procedures including the class action device conflicted with the policy choices reflected in local procedure, and that the "diverse interests of other nations' legal and regulatory schemes must be respected" [294].

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291. See *Empagran S.A.* v. *Hoffmann-LaRoche, Ltd.*, 315 F. 3d 338 (DC Cir. 2003); *Den Norske Stats Oljeselskap As* v. *Heeremac VOF*, 241 F. 3d 420 (5th Cir. 2001); *Kruman* v. *Christie's Int'l PLC*, 284 F. 3d 384 (2d Cir. 2002). As discussed in Chapter III, recent Supreme Court jurisprudence has since retreated from this position.

292. See, e.g., *In re Royal Ahold N.V. Sec. Litig.*, 351 F. Supp. 2d 334 (D. Md. 2004); *In re Vivendi Universal, S.A.* Sec. Litig., 2004 WL 2375830 (SDNY 2004). Again, this has become moot in the securities context following *Morrison*, as discussed in the preceding chapter.

293. See, e.g, Brief for Respondents, *Morrison* v. *National Australia Bank, Ltd.*, at 49.

294. Brief of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents, *Morrison* v. *National Australia Bank Ltd.*

> "[F]oreign countries – including France – have struck their own balance in regulating securities fraud in accordance with their own legal cultures, traditions, and public policy objectives. To allow foreign investors to pursue U.S. securities fraud class actions would upset that delicate balance and offend the sovereign interests of foreign nations in cases where the U.S. has no good reason to do so." [295]

This concern implicates inter-State political conflict as well, a point to which the next chapter returns.

(b) *Conflict in the recognition and enforcement of US class actions*

Perhaps the most consequential conflict between US and foreign procedural law relating to class actions involves the recognition abroad of a settlement or judgment resulting from a US class action. Countries vary in their approach to the recognition of foreign judicial proceedings [296]. Virtually all, however, permit courts to refuse recognition when giving effect to such proceedings would violate local public policy. The particular characteristics of the US class action described above create a number of potential public policy challenges. First, some countries reject the possibility of representative litigation altogether, on the ground that a legal claim cannot be disposed of without the active participation of the claim's owner. Second, even if they accept representative litigation, some countries reject the opt-out principle, often on the theory that constructive rather than actual notice to absent class members violates their due process rights. Third, in some systems the contingency fees that are often used to finance class actions are viewed as contrary to public policy [297]. On any of these grounds, there is a risk that a foreign court might invoke local public policy and deny recognition to a settlement or judgment resulting from a US class action [298].

One consequence of such a denial would be the inability of a successful plaintiff to enforce the settlement or judgment against foreign

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295. Brief for the Republic of France as *Amicus Curiae* in Support of Respondents, *Morrison* v. *National Australia Bank Ltd.*

296. The United States has signed but not ratified the Hague Convention on Choice of Court Agreements, and is party to no other treaty addressing the recognition and enforcement of judgments.

297. For a representative discussion of these public policy concerns in US class action litigation, see *In re Vivendi Universal, S.A.*, 242 FRD 76, 100-02 (SDNY 2007).

298. See, e.g., *Currie* v. *McDonald's Restaurants of Canada, Ltd.*, 74 OR (3d) 321 (Ont. CA 2005) (refusing to recognize a US judgment on grounds that the notice provided to non-resident class members was inadequate).

assets of the defendant. The likelihood of such an outcome is fairly remote, however, since the defendants in cross-border class actions generally have sufficient assets in the United States to satisfy any settlement or judgment. Far more importantly, denying recognition would interfere with the preclusive effect of the settlement or judgment.

Preclusive effect is critical to the utility of a class action. A defendant's motivation to settle a class action depends on the fact that the settlement will bar any future lawsuits by class members. In a class action involving only US plaintiffs, the court can rely on the full faith and credit clause of the US Constitution to guarantee preclusive effect [299]. In a class action involving foreign plaintiffs, however, no such guarantee is available. A court in the home country of an absent class member might conclude that the US decision should not be given preclusive effect, and thus permit the class member to relitigate there. On this basis, defendants in US class actions have successfully contested the inclusion of foreign plaintiffs in the relevant class [300].

It is important to recognize the gap between the theoretical possibility of duplicative litigation and its actual likelihood. Where the plaintiff's home State does not permit representative litigation at all, it will in most cases not be feasible, as a practical matter, for a plaintiff to seek relitigation of the claim there. Indeed, even if representative litigation is available, other practical barriers make duplicative litigation difficult. For instance, local rules on costs and fees may deter relitigation. Likewise, the unavailability of class actions makes litigation elsewhere unlikely in many circumstances [301]. As a practical matter, the preclusive effect of the US judgment is likely only a concern when the plaintiff in question has an opportunity to participate in an opt-in class action elsewhere.

E. Mitigating Conflict in Cross-border Class Actions

1. Excluding foreign claimants from plaintiff classes

One way for courts to mitigate this form of conflict is to restrict plaintiff classes to local residents. Some courts that have adopted this

299. Article IV, Section 1, of the US Constitution requires that "[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state".

300. See generally L. Simard and J. Tidmarsh, "Foreign Citizens in Transnational Class Actions", 97 *Cornell Law Review* 87 (2011).

301. See, e.g., *In re US Financial Sec. Litig.*, 69 FRD 24, 48-49 (SD Cal. 1975).

approach have simply excluded all non-US class members, citing general concerns about preclusion [302]. Others have undertaken a more nuanced analysis, reviewing the law on judgments recognition in each relevant country in an attempt to assess "the degree of risk of foreign nonrecognition" [303]. These courts worked to shape classes that included members from jurisdictions where preclusive effect was likely, and excluded others [304].

Because the application of US regulatory law to the claims of foreign plaintiffs has become nearly impossible, global class actions under US antitrust and securities law are no longer a significant risk. However, plaintiffs asserting other types of claims may still seek to certify global classes. In one recent case, representative plaintiffs filed suit against Lloyds, a UK-based bank, seeking damages relating to international mortgage loans [305]. They alleged that Lloyds had imposed certain costs on borrowers in violation of the relevant loan terms. The plaintiffs sought to represent a class including claimants from a number of different countries. The court concluded that the plaintiffs had failed to establish the probability of "*res judicata* effects" in the home countries of all proposed class members, with the exception of those from Canada. It therefore permitted only US and Canadian borrowers to participate in the litigation. As the court explained,

> "[t]he trending approach of federal courts nationwide appears to be evaluating the *res judicata* effects of class judgments with respect to groups of foreign plaintiffs and then excluding from the class those whose home countries would not honor a class judgment from the United States" [306].

2. *Moves toward convergence of collective action procedures*

In recent years, the gap between the US class action system and the procedural landscape in other countries has narrowed somewhat. This

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302. See, e.g., *In re DaimlerChrysler AG Sec. Litig.*, 216 FRD 291 (D. Del. 2003).

303. *In re Vivaldi Universal, S.A.*, 242 FRD 76, 95 (SDNY 2007). See also *In re Alstom SA Sec. Litig.*, 253 FRD 266 (SDNY 2008); *Anwar* v. *Fairfield Greenwich Ltd.*, 289 FRD 105 (SDNY 2013).

304. As Janet Walker points out, using the residence of a plaintiff as the key ignores the possibility that residents of one place might seek to litigate in another. J. Walker, "Crossborder Class Actions: A View from across the Border", 2004 *Michigan State Law Review* 755 (2004), at 774-775.

305. *Willcox* v. *Lloyds TSB Bank, PLC*, 2016 WL 8679353 (D. Hawai'i 2016).

306. *Ibid.* at *9.

is due in part – although only in small part – to developments within the United States. From time to time, the US Congress has enacted statutes reforming various aspects of the class action mechanism. The Private Securities Litigation Reform Act, for example, was enacted in 1995. The law was intended in part to promote the appointment of stronger representative plaintiffs, who would be in a better position to actively control securities class actions and monitor the performance of the attorneys [307]. Ten years later, the Class Action Fairness Act implemented a major reform of class action procedure, shifting many such actions from State courts, which were generally viewed as plaintiff-friendly, to federal courts [308]. Moreover, in a series of opinions over the past 15 years, the US Supreme Court has made it significantly more difficult for plaintiffs to sustain class actions [309]. Although these developments have restricted the utilization of class actions somewhat, however, they have not altered the basic procedure.

At the same time, other countries have adopted new procedures for aggregate litigation that in certain respects move closer toward the US-style class action. As an illustration of these developments, consider the recent action within the European Union in this area. In 2013, the European Commission issued a recommendation on "common principles for injunctive and compensatory collective redress mechanisms" in the member States [310]. This recommendation requested all member States to revise their internal procedural laws in order to provide effective mechanisms for collective redress.

Five years later, the Commission published a report tracking implementation of these recommendations [311]. The report indicates a growing acceptance among member States of collective litigation for compensatory damages. Moreover, it indicates that at least in certain circumstances, States are beginning to adopt some of the devices necessary to incentivize such litigation [312]. Taking into account the most

307. Pub. L. No. 104-67, 109 Stat. 737 (1995).

308. Pub. L. No. 109-2, 119 Stat. 4 (2005).

309. In 2011, for example, the Supreme Court issued two opinions that made collective proceedings more difficult to sustain. The first increased the burden on plaintiffs to establish the criteria necessary for class certification. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 US 338 (2011). The second affirmed the enforceability of collective action waivers in consumer contracts. *AT&T Mobility* v. *Concepcion*, 563 US 333 (2011).

310. Commission Recommendation of 11 June 2013, 2013 OJ (L 201) 60 (EC).

311. EC 25.1.2018 COM (2018) 40.

312. For earlier overviews, see C. Hodges, "Collective Redress in Europe: The New Model", 29 *Civil Justice Quarterly* 370 (2010); D. Hensler, "The Globalization of Class Actions: An Overview", in 622 *The Annals of the American Academy of Political*

recent wave of reform, collective action procedures in European States now include a variety of different forms.

- In Belgium, a 2014 amendment to the Code of Economic Law introduced a class action mechanism for consumer disputes against businesses [313]. It provides for collective redress, including monetary damages, and states that any resulting settlement or judgment will bind all class members. The law implements a dual-track system under which the court determines whether a particular action should proceed on an opt-in or opt-out basis.
- In Portugal, a class action procedure is available that utilizes a US-style opt-out [314].
- In France, a 2014 law introduced an opt-in class action mechanism in the areas of consumer protection and competition law. It provides for representative actions by consumer associations, which may seek compensation on behalf of injured consumers [315].
- Since 1994, the Netherlands has had a procedure for group litigation initiated on behalf of individual injured parties – however, it does not provide for monetary damages [316]. In 2005 legislators introduced the Dutch Act on the Collective Settlement of Mass Damage Claims [WCAM] [317]. This act authorizes the Amsterdam Court of Appeal to approve out-of-court settlements for monetary damages entered into by a representative organization (on behalf of a group of injured parties) and the responsible actor. If approved, such a settlement is binding on all members of the affected group who did not opt out.

Similar developments have occurred in other regions. A recent survey indicates that "the class action has now been integrated into civil law regimes in Asia, Europe and South America, and 21 of the 25 largest economies in the world have adopted a class action procedure" [318].

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and Social Science 7 (D. R. Hensler, C. Hodges and M. Tulibacka, eds., 2009), at 13. The Global Class Action Exchange hosted by the Stanford Law School, available at http://www.globalclassactions.stanford.edu, is a clearinghouse containing up to date legislation and commentary in the area.

313. Code of Economic Law, Art. XVII.36.

314. Lei n. 83/95 of 31 August.

315. Loi no. 2014-344 relative à la consummation. A later enactment extended the use of class actions in other areas, although in some (including data privacy), monetary relief is not available.

316. Dutch Civil Code 3 :305.

317. Law of 23 June 2005 [WCAM].

318. D. Hensler, "The Global Landscape of Collective Litigation", in *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (D. Hensler, C. Hodges and I. Tzankova, eds., 2006).

In addition to creating mechanisms for group litigation, some countries have also developed models for litigation financing that move closer to the US system. In a very few countries, including Canada, lawyers are permitted to collect contingency fees in collective cases (although only in opt-in cases). Other countries, including Australia and the United Kingdom, permit third-party funding, whereby an independent entity can pay lawyers' fees and expenses directly in exchange for a portion of any eventual recovery. Even in countries that do not allow these forms of litigation financing, other workarounds have been found that can help support collective actions. In the Netherlands, for instance, group securities actions are generally initiated by "shareholder foundations". Individual investors may either give such a foundation their power of attorney or simply transfer their claims to it outright – thus functioning more as absent class members than as individuals directing the course of the subsequent proceeding. Overall, even in those countries that do not adopt the type of costs rules that support class actions, other structures may over time come to play a similar role [319].

Nevertheless, it is important to recognize that these developments do not signal a wholesale move toward the US model. First of all, the new laws providing for collective litigation for monetary damages generally target only specific sectors – most commonly, consumer protection and competition law [320]. Second, a number of the laws implementing class actions provide that only certain entities – most commonly, industry associations – are qualified to act as representative plaintiffs. Third, for the most part, a real commitment to the elements that would generate a vibrant private regulatory scheme remains lacking. For instance, the Commission's 2013 recommendation takes into account "the legal traditions of the Member States" and the need to "safeguar[d] against abuse", and therefore stipulates that as a general rule, "punitive damages, intrusive pre-trial discovery procedures and jury awards . . . should be avoided". It also makes clear the default expectation that the group should be constituted using an express "opt in" principle [321]. As one commentator observed, the overall effect is more to establish safeguards preventing a shift to the US model than to facilitate

319. See generally M. de Morpurgo, "A Comparative Legal and Economic Approach to Third-Party Litigation Funding", 19 *Cardozo Journal of International and Comparative Law* 343 (2011).

320. In Europe, for example, only six countries have implemented mechanisms permitting collective redress across all sectors. 2018 Report, at 3.

321. Para. 21.

collective redress [322]. Thus, even such a sweeping reform project as this one, which would clearly move in the direction of convergence among systems, does not entirely eliminate conflict.

Over time, convergence among systems would diminish the risk of conflicts. To the extent that effective group litigation procedures are available in other countries, plaintiffs from those countries will be less likely to seek participation in US class actions, thus reducing the incidence of cross-border classes. At the same time, because that availability would increase the risk of relitigation, it would encourage US courts to restrict classes to local residents. The overall result would likely be a reduction of conflict at the cost of multiple parallel lawsuits arising from the same course of activity.

3. Co-ordination of parallel actions

In the event of parallel class actions, courts can mitigate conflict by actively co-ordinating the relevant cases. There have been instances of such co-operation in cross-border securities litigation. In one representative case, securities proceedings were initiated in both the United States and in the Netherlands against Converium, a Swiss reinsurance company whose shares were listed on the Swiss Exchange and, in the form of American Depository Shares, on the New York Stock Exchange. The lead plaintiffs in a US class action sought to represent all Converium shareholders worldwide. Likewise, the plaintiff foundation in a settlement proceeding initiated under the Dutch WCAM sought to represent injured investors located outside the Netherlands. The US court limited the class to shareholders who had purchased their shares on the New York Stock Exchange and who at the time of investment were resident in the United States [323]. Taking account of that action, the plaintiff foundation in the Netherlands action represented only non-US residents who had invested outside the United States [324]. Similar complementary settlements have been achieved in other cases involving these two countries [325].

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322. B. Hess, "European Perspectives on Collective Litigation", in V. Harsági and C. H. van Rhee (eds.), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?* (2014), at 7-8.

323. *In re SCOR Holding (Switzerland) AG Litig.*, 537 F. Supp. 2d 556, 569 (SDNY 2008).

324. Amsterdam Ct. App. 17 January 2012, LJN BV1026.

325. These include securities litigation against the Shell group, which also involved proceedings in both the United States and the Netherlands. There, the Amsterdam Court of Appeal approved a settlement in favour of non-US investors that included

Parallel lawsuits in US and Canadian courts have been co-ordinated by similar means. In cases in which parallel actions had already begun in Canada, for example, some US courts sought approval of proposed settlements from the relevant Canadian courts. In one such case, the settlement notice issued by the US court listed four related actions – one in the Southern District of New York, and one each in Ontario, Quebec and British Columbia – and noted that the proposed settlement was contingent upon approval of all the courts involved [326]. This kind of negotiated settlement can ensure the preclusive effect of each court's order and eliminate the possibility that a plaintiff could join both classes simultaneously.

Efforts have also begun to craft guidelines or statements of best practices for courts to follow in considering this sort of co-operation when adjudicating transnational class actions. In 2008, the International Law Association issued a resolution including guidelines intended to improve co-operation, particularly in situations where group litigation was pending, or likely, in multiple countries [327].

Interestingly, a model for more highly structured judicial co-operation can be found in a completely different area: international insolvency. The bankruptcy of any corporate entity must account for all of the entity's assets, wherever located, and the claims of all of the entity's creditors, wherever located. The bankruptcy of multinational corporations therefore creates enormous challenges. No domestic court can enforce local law against a company's foreign assets, or apply its own distribution rules to creditors based in other countries. For this reason, the dominant method for dealing with international insolvencies has historically been "territoriality", an approach under which multiple local proceedings are opened, one in each of the jurisdictions in which

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a condition: the settlement would become null and void if the non-US investors were permitted to join a class action pending in the United States. (They were not.) See *In re Royal Dutch Shell Transport Securities Litigation*, 522 F. Supp. 2d 712 (DNJ 2007); Amsterdam Ct. App. 29 May 2009.

326. Notice of Certifications in Canada and Proposed Settlement of Class Actions, *In re Nortel Networks Sec. Litig*, No. 01-CV-1855(RMB), 2002 WL 1492116 (SDNY 4 February 2002). See also *In re Royal Dutch/Shell Transport Sec. Litig.*, 522 F. Supp. 2d 712, 715 (DNJ 2007) (noting that a settlement agreement filed in the Amsterdam Court of Appeals, which would resolve all claims of non-US purchasers, was "conditioned in part on" the US district court's decision whether or not to exercise subject-matter jurisdiction over those claims).

327. ILA International Civil Litigation and the Interests of the Public Committee, Resolution No. 1/2008. The resolution and associated report are discussed in C. Kessedjian, "The ILA Rio Resolution on Transnational Group Actions", in *Extra-territoriality and Collective Redress* (D. Fairgrieve and E. Lein, eds., 2012), 233.

assets of the insolvent company are located [328]. That approach avoids direct conflicts of law, but means that multiple parallel proceedings are required to resolve a single insolvency [329].

In 1997, UNCITRAL adopted a Model Law on Cross-Border Insolvency, which has been enacted in approximately twenty countries [330]. Article 25 of the model law states that "[a bankruptcy] court shall cooperate to the maximum extent possible with foreign courts or foreign representatives", and provides that the court is entitled to communicate directly with these foreign counterparts. The law also takes further steps to put "hard" forms of co-operation in place. Article 27 states that

> "[c]ooperation . . . may be implemented by any appropriate means, including . . . coordination of the administration and supervision of the debtor's assets and affairs; approval or implementation by courts of agreements concerning the coordination of proceedings; [and] coordination of concurrent proceedings regarding the same debtor".

This legislation thus expands the space of engagement for domestic bankruptcy courts. It invites them to consider insolvency regulation as a global process rather than one that focuses on the local treatment of local assets. It also creates room for cross-border creditor groups to argue for the most globally effective strategy of distribution or reorganization. Within this framework, courts have in some cross-border cases entered into joint protocols with their counterparts in other jurisdictions, creating the foundation for shared plans of distribution that reconcile inconsistent laws on the treatment of particular claims in bankruptcy [331].

F. Layered Conflict

As this chapter demonstrates, divergence in procedural law creates specific forms of conflict in cross-border economic regulation. In the

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328. See L. LoPucki, "The Case for Cooperative Territoriality in International Bankruptcy", 98 *Michigan Law Review* 2216, 2219 (2000).

329. For an argument in support of "universalism", the primary alternative, see J. Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum", 65 *American Bankruptcy Law Journal* 457 (1991).

330. Available at http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf.

331. For a summary of such cases, see UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2010).

sphere of public enforcement, these types of conflict are addressed quite effectively, if not completely, by active co-operation and co-ordination among regulatory agencies. In the sphere of private enforcement, however, conflict is harder to mitigate.

It is important to highlight that the conflicts caused when courts apply domestic procedural law to cross-border regulatory claims are particularly difficult because they are so often intertwined with conflicts of substantive law. "Extraterritorial" discovery of evidence, and global class actions, are often used to support litigation that involves the application of US regulatory law to claims with significant foreign elements. This distinguishes regulatory litigation from ordinary civil litigation, where application of the same procedural rules causes significantly less conflict.

Take for example a garden-variety products liability case. In this hypothetical case, a foreign corporation develops a product for the US market and then advertises and sells it there. A defect in the product causes injury to multiple US consumers, who bring a class action against the corporation that includes a claim for punitive damages. In this kind of case, widely shared norms of private international law support the application of US tort law to the plaintiffs' claims. Because the corporation's activity did not affect a foreign market or foreign consumers, there is no sovereign other than the United States with an interest in regulating the relevant activity. Thus, the procedural conflicts that may result are relatively routine. For example, they might involve the authority of the US court to order the defendant to produce documents located at its headquarters. And if US plaintiffs form a class, the court may confront routine issues regarding the ultimate enforceability of a settlement or judgment. Likewise, there may be complaints about the potential financial impact of a US judgment on the foreign defendant – but in the context of the defendant's US-directed economic activity.

In cross-border regulatory cases, the mix of considerations is different. These cases typically involve more complex transnational fact patterns. For example, cross-border securities litigation generally involves the activity of issuers whose securities are cross-listed, and whose conduct therefore affects interests in multiple countries. Similarly, cross-border cartel regulation typically involves enterprises whose activity affects multiple product markets. In these cases, complaints about the use of a class action, or the availability of discovery, may really be proxies for complaints about the application of domestic regulatory law to the

relevant claims [332]. In other words, the procedural conflict is layered on top of conflict regarding the appropriateness of resolving the claims pursuant to US law.

At least in the United States, there is an awareness of this layering problem – and it may be contributing to an emerging differentiation between conflicts in transnational public regulation and conflicts in transnational regulatory litigation. Such a distinction can be traced both in judicial and in legislative treatment. In the area of securities regulation, for example, Congress took action that reinforced this divide. Recall that in *Morrison*, the Supreme Court narrowed the geographic scope of Section 10 *(b)*, holding that it encompassed only claims arising out of transactions occurring in the United States [333]. That case involved a private claim under Section 10 *(b)* of the Securities Exchange Act, and the Court's analysis focused on the combination of procedural and substantive conflicts:

> "Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in single suit, what attorney's fees are recoverable, and many other matters." [334]

In other words, the desire to avoid particular complications arising in the context of private litigation was part of the Court's justification in restricting the scope of US anti-fraud law to claims arising out of local transactions. That holding, however, affected the law's scope of application in public regulatory proceedings as well.

Congress responded by legislatively overruling the decision – but only with respect to public enforcement. In Section 929P of the Dodd-Frank Act, it restored the authority of public enforcement agencies, including the Securities and Exchange Commission and the Department of Justice, to apply US anti-fraud law on the basis of either

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332. See Lowenfeld, *supra* footnote 111.
333. Chapter III.
334. 561 US 247, 269 (noting that these differences had been raised by a number of foreign Governments in *amicus* briefs).

> "(1) conduct within the United States that constitutes significant steps in furtherance of the violation, *even if the securities transaction occurs outside the United States and involves only foreign investors;* or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States." [335]

The enforcement of US securities law in cross-border cases may therefore continue, but only in the form of public regulation, where the additional forms of conflict triggered by private enforcement procedures are absent.

The *RJR Nabisco* case provides another illustration of this layering problem. As outlined in Chapter III, the Supreme Court there concluded that at least some of RICO's substantive causes of action did apply to foreign conduct. It therefore confirmed the availability of that statute to regulate certain forms of cross-border activity. However, it considered RICO's private cause of action separately, and concluded that it did not permit private plaintiffs to recover for injuries suffered outside the United States. This holding effectively forecloses private enforcement of RICO in the cross-border context. In drawing this distinction between public and private enforcement, the Court focused on procedural rather than substantive conflict. It cited at length a number of excerpts from *amicus* briefs filed in previous cases by foreign Governments that had identified various elements of the US system as incompatible with their own. These included "extensive discovery, jury trials, class actions, contingency fees, and punitive damages", as well as the general tendency to use private enforcement rather than "state actions" to enforce regulatory law [336]. The Court concluded that "providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct" [337].

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335. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1376 (2010) (codified as amended at 15 USCA, § 78aa *(b)*) (emphasis added).
336. *Ibid.* at 2107 and at fn 9.
337. *Ibid.* at 2106.

CHAPTER V

POLITICAL CONFLICTS IN TRANSNATIONAL ECONOMIC REGULATION

A. Introduction

This chapter addresses political conflict related to the allocation of regulatory power and authority among competing institutions. The focus here is not on the specific collisions between the laws of different States that arise in individual instances of regulation. Rather, it is on the "rules" governing the distribution and exercise of regulatory authority both within the international community and within individual States.

In the inter-State context, political conflict is simply an undercurrent of the types of conflict we have already examined. It nevertheless merits separate consideration. First, the existence of political conflict helps explain why the cross-border application of domestic regulatory law is problematic even when the States in question agree on the substantive norm being applied. Second, the intensity of such conflict varies depending on which country is acting as the regulator and which other countries are affected by its actions, since States are not equally situated in terms of their economic and political power. This helps explain why certain regulatory practices create more difficulty in cross-border application than others.

In the intra-State context, a consideration of political conflict brings us to an issue we have not yet touched on: internal allocations of authority that affect the structure of cross-border regulation. This issue arises within regional organizations as well, although in different ways.

These forms of political conflict cannot be readily systematized, and this chapter makes no attempt to do so. Rather, it analyses various types of political conflict, and attempts to draw some conclusions about how they affect the design of global regulatory strategies. In particular, returning to the theme of previous chapters, it asks whether political conflict is exacerbated in the context of private enforcement.

B. Interstate Conflict: The Role of Sovereignty in Cross-Border Regulation

1. Sovereignty and legislative jurisdiction

Perhaps the clearest form of political conflict that results from cross-border economic regulation is conflict generated by the extraterritorial application of national law. Chapter III laid the foundation for this analysis. As there discussed, certain regulatory laws are explicitly intended to cover foreign as well as domestic actors – or foreign as well as domestic conduct. The US Sarbanes-Oxley Act, for instance, applies to all issuers whose securities are listed on a US exchange, including those incorporated outside the United States. Likewise, the EU Global Data Protection Regulation applies to all entities that gather personal data originating within the European Union, regardless of those entities' location of operation. Other laws neither expressly contemplate nor expressly preclude their application to foreign actors or conduct, but have been interpreted by enforcement agencies, or by courts, to have extraterritorial reach. This is the case with many competition laws, for example.

The problem discussed in Chapter III is that regulatory norms often differ in substance among countries, and extraterritorial regulation by one State can therefore create a substantive conflict with regulation in another. However, regardless of the substance of the laws – and thus regardless of whether the regulatory provisions are incompatible – extraterritorial regulation involves the projection of domestic regulatory power into the territory of other countries, and is often viewed by other nations as a serious infringement upon local sovereignty. For instance, when the United States adopted Sarbanes-Oxley, the reaction not only of European business leaders but also of European Governments was that the law represented an act of regulatory imperialism by the United States [338]. On the other side of the coin, the enactment of the GDPR met similar reactions from non-EU States and companies.

These sovereignty-based objections do not hinge on the substance of the relevant norm, but rather on the framework of the international order. They are based on the argument that broad extraterritorial regulation violates the international jurisdictional law whose purpose

338. See account in K. Rebane and J. Marx, "The Sarbanes-Oxley Act of 2002: A Catalyst for Global Corporate Change?", in *Globalisation and Jurisdiction* (P. Slot and M. Bulterman, eds., 2004), at 235.

is to safeguard the international community against overreaching by individual nations. In one *amicus* brief, for instance, the European Commission argued that

> "in order to respect the authority of States and organizations, like the European Community, exercising their authority to regulate activities occurring on their own territory, and hence to preserve harmonious international relations, States must respect the limits imposed by international law on the authority of any individual State to apply its laws beyond its own territory" [339].

This objection is therefore not just an objection by a State about a particular regulatory choice that is being undermined. Rather, it is a statement about the rules that constitute the international community as a whole. This kind of conflict arises frequently across all areas of economic regulation, and persists despite the increasing acceptance of effects-based jurisdiction. The same concerns about sovereignty and the international regulatory order can be traced from the uranium cartel disputes of the 1970s, to the aftermath of the United States' enactment of the Helms-Burton Act in 1996, to recent debate over the best way to improve the regulation of cross-border financial derivatives.

The private enforcement of regulatory law generates this form of conflict as well. That it must is not self-evident. To some extent, civil litigation under regulatory law is analogous to ordinary tort litigation: a plaintiff sues to recover compensation for damages caused by the defendant's unlawful conduct. One might therefore expect that a State would have no particular objection to the application of foreign competition law to an actor or conduct within its borders in a private lawsuit, under circumstances in which choice-of-law principles led to its application [340]. After all, under post-territorial approaches to choice of law, domestic law is routinely applied to foreign actors or conduct.

However, regulatory law expresses the specific governmental interest of a sovereign State regarding matters relating to the economy and the public welfare. As many commentators have noted, it follows that a State's interest in enforcing its own regulatory rules is stronger than its interest, in the sense of social policy, expressed in rules of private law

339. Brief of Amicus Curiae the European Commission in Support of Neither Party, at 2, *Sosa* v. *Alvarez-Machain*, 542 US 692 (2004) (No. 03-339), 2004 WL 177036.

340. For instance, effects-based jurisdiction for certain forms of delict.

such as torts and contracts [341]. Thus, even in systems that treat private claims under regulatory law as more strictly compensatory in nature, the "government always has a direct interest in the outcome of a regulatory case" [342]. Moreover, as explored in Chapter IV, some systems, including the US system, create incentives supporting such litigation that give private claims under economic law a strongly regulatory aspect. Accordingly, the reaction of foreign Governments to the extraterritorial application of regulatory law in private litigation can be just as strong as their reaction to its application by public entities. The frequency with which foreign States file *amicus* briefs in transnational regulatory cases in US courts is evidence of this concern [343].

This form of conflict is difficult to address partly because the content of the international jurisdictional law on which such objections rest is so indeterminate. One of the opinions in the seminal *Barcelona Traction* case [344] captures this indeterminacy. It notes that

> "international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction . . . It does however *(a)* postulate the existence of limits . . . and *(b)* involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State" [345].

As intervening decades have shown, there is little agreement on exactly what the postulated limits look like.

For many years, for instance, many countries adhered strictly to the principle of territorialism, in part on the basis of the principle of non-intervention into the affairs of another State [346]. Over time, however,

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341. R. Weintraub, "Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a Choice-of-Law Approach", 70 *Texas Law Review* 1799 (1992).

342. *Ibid.* at 1818. But see Lowenfeld, *supra* footnote 111, at 53 ("That position seems to me thoroughly unsound, because it treats an issue of law as if it were an issue of politics").

343. See discussion in K. Eichensehr, "Foreign Sovereigns as Friends of the Court", 102 *Virginia Law Review* 289 (2016), at 312-314.

344. *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, *ICJ Reports 1970* 3 (5 February) (separate opinion of Sir Gerald Firzmaurice).

345. *Ibid.* at 105.

346. R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 74-75 (discussing the position that effects-based jurisdiction is "simply unlawful under international law").

effects-based jurisdiction came to be more widely accepted, along with the recognition that valid State interests rather than territorial linkages could under certain circumstances support the exercise of jurisdiction. Today, common articulations of the limits on jurisdiction state simply that there must be some connection between the regulating State and the object of regulation. As one leading treatise puts it, "If there is a cardinal principle emerging, it is that of genuine connection between the subject-matter of jurisdiction and the territorial base or reasonable interests of the state in question"[347]. What constitutes a "genuine connection", however, remains contested.

Clearly, the encroachment of a regulating State onto the sovereignty of other States is most problematic when the laws in question differ in substance. In those situations, there is a double insult: not only does the regulating State seek to impose its will within the territory of another country, but in doing so it overrides the specific legislative choices that have been made by the other sovereign. That kind of override, as explored in Chapter III, can create direct regulatory incompatibilities. For example, Sarbanes-Oxley as initially formulated would have required foreign companies with listings in the United States to appoint independent audit committees. This change to internal corporate structure would have been incompatible with laws regarding worker representation in place in some countries. As a result, foreign States protested that the United States was effectively interfering with their own right to regulate local companies. To take another example, US antitrust laws provide private plaintiffs with enhanced remedies compared to those available in many foreign systems. Accordingly, in many antitrust cases, European residents who would have had access to compensatory damages in local antitrust litigation sought instead to join class actions in the United States, where their claims would be adjudicated under US rather than foreign law. When foreign countries protested the extraterritorial application of US law to their claims, they argued not only that the application of US law violated international jurisdictional norms, but also that the substantive differences between their law and US law gave their residents the opportunity to evade local regulatory choices. In their view, this amounted to US interference with their ability to insist on local regulatory and remedial schemes.

This type of conflict may also be exacerbated by the particular relationship between the regulating State and other affected States.

347. Crawford, *supra* footnote 229, at 457.

The United States, in particular, has frequently been singled out for its "exercise of extraterritorial jurisdiction [as] a tool of international government" [348]. Its efforts to leverage its economic position in order to expand its own regulatory authority have led to many episodes of political conflict. In this vein, one commentator criticized the "American pretension to extraterritorial application of national law, especially when associated with the application of more or less deliberately coercive sanctions" [349].

2. Sovereignty and enforcement jurisdiction

A similar form of inter-State political conflict has emerged in connection with the exercise of enforcement jurisdiction. The concern here is that the enforcement of procedural orders affecting foreign persons or interests may be seen as an infringement upon another country's sovereignty. The resulting conflict creates political obstacles to the development and utilization of mechanisms for cross-border co-operation. The following sections discuss two examples of this problem, one arising in civil enforcement and the other in criminal enforcement.

(a) *Civil enforcement: "judicial sovereignty" and the challenge of cross-border discovery*

The term "judicial sovereignty" is sometimes used to describe the exclusive control of courts over functions assigned to them in particular legal systems. Thus, for instance, many civil-law systems designate evidence gathering as a public judicial act. This designation precludes unauthorized persons, including the litigants themselves, from performing or ordering evidence gathering during the course of litigation. In cross-border litigation, however, it takes on an international law dimension: it prohibits any foreign entity, including foreign courts, from usurping the authority of the local judiciary [350]. Discovery orders issued in connection with US litigation that demand the production of evidence located in such countries will inevitably involve a direct

348. N. Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order", 16 *European Journal of International Law* 403 (2005).

349. P.-M. Dupuy, "Comments on Chapters 4 and 5", in M. Byers and G. Nolte, *United States Hegemony and the Foundations of International Law* (2003), 181.

350. See Gerber, *supra* footnote 219, at 537 (describing judicial sovereignty as "one application of the broader principle of international law that proscribes conduct by one state within the territory of another without the latter's consent").

conflict between judicial sovereignty, on the one hand, and the US interest in liberal discovery, on the other.

As in the case of legislative jurisdiction, there may be two layers to this form of conflict. Sometimes a discovery order issued by a foreign court will not only infringe upon the judicial sovereignty of another country, but also create a direct conflict with a procedural or substantive law in that country. (Chapter IV examined conflicts involving bank secrecy laws, for example.) In such cases, the issue is not simply the insult of a foreign court attempting to enforce orders in another country, but a true conflict of procedure. In one illustrative case, the Swiss Government noted that the violation of sovereignty flowing from a US discovery order is "compounded" when Swiss law prohibits release of the relevant information [351].

However, as in the case of objections to legislative overreaching, countries may object to overreaching of enforcement authority even when a discovery order presents no direct conflict with a local norm. In the Swiss brief noted above, the Government argued that the principle of judicial sovereignty "derives from the doctrine of territorial jurisdiction in international law", such that any efforts of a foreign court to enforce a discovery order in Switzerland "violates Swiss sovereignty and international law" [352].

The justifications offered for the enactment of blocking statutes likewise reflect this political dimension. States implementing such legislation frequently articulate its purpose in terms of preserving the order of the international community. In one case raising a dispute about the application of American discovery rules in a cross-border context, the Swiss Government argued that

> "Swiss judicial sovereignty, and the laws that protect it, should not be viewed as 'blocking statutes' designed to frustrate United States discovery procedures. Rather, they are a reflection of a national political tradition that places great value on the sovereign independence of the nation and the individual autonomy of its citizens." [353]

The United Kingdom likewise argued that it "is entitled to exercise its sovereign power within its jurisdiction, and it is entitled to protect that

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351. Brief of Government of Switzerland as *Amicus Curiae* in Support of Petitioners, *Société Nationale Industrielle Aerospatiale*, 1986 WL 727499.

352. *Ibid.*

353. *Amicus* brief for Switzerland at 10, reprinted in 25 *ILM* 1554.

exercise by the sovereign act of promulgating defensive legislation" [354]. On this view, blocking statutes proceed from the principle that under international law, and consistent with the right of a nation to bar actions within its territory that violate its sovereignty, the adopting State has the right to block evidence-gathering to which it has not consented [355]. This orientation again adds a political dimension to what might otherwise be seen merely as a difference in philosophy between civil justice systems.

(b) *Criminal enforcement: "data sovereignty" and the challenge of cross-border production of data*

This type of political conflict has recently surfaced in the context of criminal enforcement as well, as a result of efforts by public authorities to compel the production of electronic data stored in a foreign country. The recent litigation between the US Government and Microsoft provides an illustration [356]. That case began with an investigation by federal law enforcement agents of an individual suspected of drug trafficking. The agents obtained a warrant requiring Microsoft to produce e-mails and other relevant information from the suspect's web-based e-mail account, to the extent that such information was within Microsoft's "possession, custody, or control". The data were stored on a server in Ireland, however, and on that basis Microsoft refused to supply the requested information. It then moved to quash the warrant [357].

The case turned on the interpretation of the Stored Communications Act of 1986, which established a framework for protecting the privacy of electronic data. Under an exception to the SCA's rules protecting the privacy of electronic communications, a data service provider may divulge such communications to a governmental entity without the customer's consent if a search warrant has been issued. The question in dispute was whether the SCA reaches electronic communications stored outside the United States. Both parties agreed that the SCA itself did

354. *Amicus* brief for the United Kingdom at 14, reprinted in 25 *ILM* 1564.

355. See Douglas E. Rosenthal, "Jurisdictional Conflicts between Sovereign Nations", 19 *International Lawyer* 487 (1985), at 492 ("[the] extraterritorial assertion of blocking jurisdiction appears to be an expression of principle and of indignation . . . Blocking laws are a dramatic expression of the conviction of [adopting] nations that in many adjudications and in many enforcement acts since World War II, the United States has violated and continues to violate international law").

356. This particular case was mooted by the legislature's enactment of a new statute, the CLOUD Act. *United States* v. *Microsoft Corp.*, 138 S. Ct. 1186 (2018). That statute is discussed *infra*.

357. *In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 15 F. Supp. 3d 466 (SDNY 2014).

not include a clear indication that it had extraterritorial scope. However, they disagreed whether the requested disclosure would actually involve an extraterritorial application of the statute. Applying the interpretive test laid out in *Morrison* [358], the United States argued that the SCA's focus is on the act of disclosure. Therefore, if the requested disclosure would take place within the United States, it could be ordered under US law. Microsoft argued that the law's focus is on the electronic communications themselves. On that view, the Government would be unable to compel production of communications stored outside the United States.

As in the case of civil subpoenas issued in order to compel compliance with discovery orders, the potential utilization of criminal warrants in this way triggered discussions regarding the role of sovereignty. Ireland filed a brief referring to its "sovereign rights with respect to its jurisdiction over its territory" [359]. Likewise, an *amicus* brief filed by the European Commission referred to public international law in invoking sovereignty concerns: "The European Union's foundational treaties and case law enshrine the principles of 'mutual regard to the spheres of jurisdiction' of sovereign states . . ." [360]. And, again as in the case of subpoenas relating to discovery orders, the case also involved potential substantive conflict between the applicable regimes. Several members of the European Parliament argued in another *amicus* brief that applicable EU data protection law prevented the disclosure of the requested data without certain safeguards, which in their view were not in place. The brief argued that for US law to treat data stored in Ireland as though it were stored in the United States would constitute a "territorial encroachment", exacerbated by the substantive differences between the two legal regimes [361].

By invoking their sovereignty interests, the States involved were not necessarily arguing that an order to compel the production of the

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358. Under that test, if a statute does not include a clear indication of extraterritorial reach, it has none. In a case with foreign elements, a court must then determine whether a "permissible domestic application" is possible despite those foreign elements. It does so by ascertaining the focus of the relevant statute, and determining whether the thing that is the focus occurred inside the United States or not. See *supra*, Chapter III.

359. Brief for Ireland as *Amicus Curiae* in Support of Neither Party, *U.S.* v. *Microsoft*, No. 17-2, at 1.

360. Brief of the European Commission on behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *U.S.* v. *Microsoft*, No. 17-2, at 7.

361. Brief of *Amici Curiae* Jan Philipp Albrecht, Sophie In'T Veld, Viviane Reding, Birgit Sippel, and Axel Voss, Members of the European Parliament, in Support of Respondent Microsoft Corp., *U.S.* v. *Microsoft*, No. 17-2, at 19.

communications was overreaching on the part of the United States. The US Government clearly had a legitimate interest in obtaining the data, based on the existence of probable cause to believe that the communications related to criminal activity. The briefs for both Ireland and the United Kingdom in fact recognized circumstances under their own laws in which the disclosure of electronic communications stored in other countries might be ordered. Rather, they were making a point about the methods by which such disputes should be resolved – methods that took account of the need for international harmony. Indeed, the conclusion the Commission drew from its observation regarding the mutual regard for spheres of jurisdiction was that it was incumbent on the State seeking the data to take the interests of the affected foreign sovereign into account [362].

3. Mitigating inter-State political conflict

Clearly, these forms of inter-State political conflict cannot be completely eliminated, at least not in the foreseeable future. It is true that the concept of sovereignty – as here explored, in relation to regulatory authority – has been reshaped and challenged by the forces of globalization. Increasingly, "social and economic interactions and transactions defy the limits of territorial or state boundaries", disrupting the exclusive control over territory that has been the hallmark of sovereignty as traditionally understood [363]. Accounting for that development, many legal scholars, drawing on work in areas including international relations, sociology, and critical geography, have challenged the links between territory and sovereignty that underpin traditional jurisdictional law. Nevertheless, as a descriptive matter, it is clear that our system of governance retains strong roots in the Westphalian tradition. As a result, norms intended to preserve harmony among sovereign States remain an important part of the transnational regulatory system. And yet, as we have seen, there is broad consensus among countries that national laws, which remain the primary source of economic regulation, cannot be fully effective against transnational conduct unless, in some circumstances, they reach beyond national borders. As a result, there will always be tension between the desire of individual States to further their own regulatory interests and the need

362. Brief of the European Commission, *supra* footnote 360, at 6-7.

363. A. Addis, "The Thin State in Thick Globalism: Sovereignty in the Information Age", 37 *Vanderbilt Journal of Transnational Law* 1 (2004), at 14.

of the international community as a whole to preserve harmony among its members.

Global regulatory frameworks incorporate a number of different strategies designed to address this tension. The following section addresses three such strategies: the use of comity; the development of consent-based solutions to cross-border regulatory challenges; and the reversion to conventional conceptions of territorial sovereignty in defining the limits of jurisdiction. In all cases, the analysis does not so much suggest that the tension between community norms and national interests can be resolved, but rather that the interplay between those elements is a permanent feature of international economic regulation.

(a) *The use and limitations of comity*

In a system depending on regulation under domestic law, comity plays an important role in mediating among competing interests. Indeed, the principle of comity as traditionally understood captures perfectly the tension between concern for the international community and national interests. Huber's classic statement of "positive" comity – that is, comity as applied to justify a sovereign's decision willingly to give effect within its borders to the law of a foreign State – recognizes the point at which system needs collide with national interest:

> "[T]hose who exercise sovereign authority so act from comity that the laws of each nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the powers or rights of another state or its subjects." [364]

Later formulations of the principle focusing on its "negative" aspect – that is, comity as a doctrine encouraging one sovereign to forego application of its own law in deference to another State – likewise recognize these limits. In addressing claims arising from cartel activity, for instance, the US Supreme Court invoked the principle of "prescriptive comity" in order to "avoid unreasonable interference with the sovereign authority of other nations", but suggested that the principle did not require deference when a local regulatory interest was present [365].

364. E. Lorenzen, "Huber's De Conflictu Legum", 13 *Illinois Law Review* 375 (1919).

365. *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 US 155, 163 (2004).

There can be no doubt that comity plays a significant role in mitigating the type of inter-State political conflict described above. In a great range of cases involving the exercise of legislative and enforcement jurisdiction, both public agencies and courts routinely invoke comity as a means of avoiding infringements on foreign sovereignty. (These are discussed in Chapters III and IV.) Because comity does not require deference to foreign or international interests, however, international community values often yield to strong national interests. Some initial steps have been taken to develop a more proactive application of comity – in the sense of a "principle of affirmative cooperation between government agencies of different nations", whereby one State would take regulatory action to promote the interests of another [366]. However, there is little evidence to date that this approach has taken root.

(b) *The use and limitations of consent-based solutions*

Perhaps the most straightforward way to mitigate sovereignty concerns in cross-border regulation would be to abandon the extraterritorial application of national law in favour of consent-based solutions (that is, multilateral or bilateral treaties, or other instruments of State-to-State agreement) to cross-border regulatory challenges. Some commentators have suggested as much, arguing that in addition to preventing sovereignty clashes, negotiated solutions offer a variety of instrumental advantages over uncoordinated extraterritorial action. They can yield more comprehensive regulatory solutions; they mitigate the risk that individual countries emerge in a hegemonic sense as "global policemen"; and, as compared to extraterritoriality in the sphere of private enforcement, they avoid the problem of inconsistent approaches to particular shared problems [367].

However, there are significant practical impediments to such solutions. Most obviously, the process of international lawmaking, particularly in the multilateral context, involves daunting challenges. The failure of initiatives in various areas of substantive regulation (including antitrust) and private international law (including jurisdiction and judgments) illustrates the complexity of that task. Moreover, shifting to the plane of negotiated solutions does not necessarily eliminate the problem. In a variety of ways, the process of international lawmaking

366. See A.-M. Slaughter, *A New World Order* (2004), *supra* footnote 72, at 250.
367. A. Parrish, "Reclaiming International Law from Extraterritoriality", 93 *Minnesota Law Review* 815 (2009), at 865-868.

itself generates significant contestation regarding sovereignty and the values of the international community.

First of all, unilateral action – in the form of extraterritorial application of domestic law – always remains an available backstop in regulating cross-border economic conduct. For that reason, even as States move toward developing consensual solutions (whether in the form of multilateral treaties, negotiated sub-State level bilateral agreements, or uniform principles and practices subsequently adopted by individual legal regimes), they frequently express their sovereign rights by threatening unilateral action. Thus, the process of arriving at a multilateral regulatory solution may involve an iterative mediation of local and community interests.

The recent negotiation of regulations in the area of cross-border financial derivatives illustrates this sort of recursive pattern. Following the global financial crisis, G20 States agreed to a set of high-level goals regarding the regulation of cross-border derivatives, and embarked on the process of implementing those goals within their own regimes. They recognized the importance of harmonizing the laws of different countries, in order to avoid the type of market fragmentation that would result in persistent systemic risk. However, they also reserved the right to act unilaterally if they felt that doing so was necessary to protect the integrity of local markets. Even as they worked toward a negotiated, coordinated regime, some continued to threaten aggressive extraterritorial regulation. This cycle resulted in a significant dispute between the United States and the European Union, leading at one point to complaints that US regulators were "violating norms of global regulatory cooperation [by aggressively] claiming jurisdiction over activities in other nations on the grounds that they affected the United States" [368]. The dispute was eventually defused, leading to the implementation of the mutual recognition regime introduced in Chapter III. However, the episode demonstrates that this form of political conflict is a permanent feature of transnational lawmaking processes.

Second, States often use multilateral institutions to pursue their own domestic regulatory objectives. This dynamic has drawn frequent attention in the context of treaty negotiations, and can be traced in a number of past episodes involving instruments governing commercial activity. Consider for example the genesis of the OECD's involvement

368. D. McCaffrey, *Private and Public Controls in the Over-the-Counter Derivatives Market, 1984-2015* (10 October 2015) (unpublished manuscript), http://ssrn.com/abstract=2642216, at 46.

in anti-bribery regulation, which yielded the multilateral convention to which 43 States are now party [369]. That project was initiated largely at the urging of the United States. At the time, the United States was clear that its interests included not only fostering economic development and supporting democratic institutions worldwide, but also furthering particular domestic regulatory interests. These included the elimination of the competitive disadvantage suffered by American companies who were already limited in their foreign business dealings by American anti-corruption law [370].

The same issues surface in the work of transnational regulatory networks in various areas. Earlier chapters addressed the proliferation of co-operative networks among national regulatory agencies, which have joined traditional multilateral organizations such as the OECD in addressing cross-border challenges. In some cases, the very formation of such networks serves the policy interest of particular States. The International Competition Network, for example, grew out of a US initiative. In the late 1990s, US antitrust heads had formed an advisory committee to address global antitrust problems in the context of economic globalization, looking at issues such as cross-border merger review. That committee suggested the formation of a global competition network whose efforts would be directed in part toward a greater convergence of competition law. The suggestion was intended as an alternative to the ongoing European initiative to bring competition law within the WTO [371]. As one commentator described the process:

> "If powerful countries dislike the lack of consensus or the state of debate in an organization, they can exit and move discussions to another pre-existing or new organization. The United States was unhappy with the WTO as an institutional choice for international antirust. It therefore created the ICN as an institutional home for the U.S.-framed antitrust agenda." [372]

369. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

370. Alan Larson, "US Policy on Corruption", in *Corruption and the Global Economy* (Institute for International Economics).

371. See E. Fox, "Linked-In: Antitrust and the Virtues of a Virtual Network", 43 *International Lawyer* 151 (2009) (providing an account of the network's formation).

372. D. Sokol, "Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age", 4 *Berkeley Business Law Journal* 41 (2007), at 52.

In their operation, some networks are as a formal matter restricted to powerful States with particular regulatory objectives. Others simply "privileg[e] the expertise and superior resources" of those States [373], permitting them in various ways to influence regulatory outcomes [374]. Such mechanisms are therefore routinely used by powerful countries to promote the spread of their own regulatory norms [375]. Their use therefore does not eliminate concerns about the sovereign prerogatives of other States – indeed, it may even "magnify asymmetries of power in the existing international system" [376].

Third, even after multilateral solutions are in place, decisions whether and to what extent to utilize them may arise [377]. These decisions too reflect the ongoing tension between consent-based solutions and unilateral extraterritorial action. In the area of cross-border discovery of evidence, for example, this debate flared following the enactment of the Hague Evidence Convention. As discussed in Chapter IV, that Convention was negotiated in order to bridge the differences between civil law and common law systems regarding the discovery of evidence. Its aim was to establish a set of compromise procedures: ones that would be acceptable to the authorities of the State where evidence was located, and that would yield evidence utilizable in the fora of the requesting State. However, many litigants in US courts continued to seek discovery under domestic rules even after the United States ratified the Hague Evidence Convention [378].

In 1987, the US Supreme Court heard a case arising out of this practice [379]. It involved a products liability claim against a French aircraft manufacturer and its French subsidiary. The US plaintiffs requested the production, pursuant to US procedural rules, of certain material located outside the United States. The defendants sought a protective order, arguing that because the evidence sought was located

373. N. Krisch, "More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law", in M. Byers and G. Nolte, *United States Hegemony and the Foundations of International Law* (2003), at 159.

374. P.-H. Verdier, "The Political Economy of International Financial Regulation, 88 *Indiana Law Journal* 1405 (2013), at 1434-1435.

375. Krisch, *supra* footnote 373, at 163 ("[T]he superior expertise of US agencies, the availability of model norms in US domestic law, and the market dominance of US corporations . . . favor the modeling of internationally applicable rules on US domestic law").

376. Slaughter, *A New World Order*, *supra* footnote 72, at 227.

377. Setting aside the issue of actual exit from treaty obligations.

378. See discussion in Chapter IV.

379. *Société Nationale Industrielle Aérospatiale* v. *US Dist. Court*, 482 US 522 (1987).

in France, application of the Convention (to which both France and the United States were party) was mandatory. The federal district court hearing the case denied that motion, a decision that was upheld by the Eight Circuit Court of Appeals on the basis that the Convention did not apply at all when a discovery request was made of a party subject to the jurisdiction of a US court [380].

The Supreme Court considered whether the Hague Evidence Convention was the exclusive and/or mandatory method for obtaining evidence abroad. In its *amicus* brief, France argued that the Convention provided the exclusive route to obtain evidence located in a signatory State unless the relevant sovereign permits otherwise. In its argument, France reasoned that, the United States having negotiated a multilateral solution, US courts must be bound by it:

> "The Convention should not be interpreted as if it merely gave the United States new and unilateral privileges without imposing upon it any concomitant obligation of restraint. To the contrary, the Convention should be recognized as a carefully negotiated compromise embodying reciprocal concessions by the United States and civil law countries." [381]

Some other countries filed *amicus* briefs supporting that position: the *amicus* brief for the Federal Republic of Germany, for example, stated that a holding that courts were free to apply either the Convention procedure or local procedural law "abrogates the treaty which already incorporates the balancing of competing sovereign interests" [382]. Others concluded that the Convention procedures were not exclusive, but that "due regard for foreign sovereign interests" required that the Convention be employed at least as a first resort, before ordering evidence through some other means [383].

The Supreme Court considered the relationship between France's interest in protecting its sovereignty and the specific interest of the United States in accessing important evidence. Interpreting the language of the Convention as optional rather than mandatory, it

380. *In re Société Nationale Industrielle Aérospatiale*, 782 F. 2d 120 (8th Cir. 1986).

381. Brief of *Amicus Curiae* the Republic of France in Support of Petitioners, *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Court*, at *12.

382. Brief of the Federal Republic of Germany as *Amicus Curiae*, *Société Nationale Industrielle Aéorspatiale* v. *U.S. Dist. Court*, at *16.

383. Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Petitioners, *Société Nationale Industrielle Aéorspatiale* v. *U.S. Dist. Court*, at *8.

rejected the proposition that the Convention was the only possible path to discover evidence located in a foreign member State. It also rejected the proposition that first resort should be made to the Convention before proceeding with discovery pursuant to local law. Rather, it concluded, courts should consider the various interests presented in each individual case [384]. This decision freed courts to weigh the interests of litigants in obtaining discovery more heavily than the sovereign interests otherwise protected by the multilateral Convention regime.

Similarly, consider developments in the area of data protection following the *Microsoft* litigation. In 2018, the European Union's GDPR came into effect. That Regulation provides that any transfer or disclosure of personal data to a court or agency outside the European Union must follow the procedures laid out in an MLAT or other international agreement [385]. At nearly the same time, the United States enacted the Clarifying Lawful Overseas Use of Data (CLOUD) Act, which includes a provision stating expressly that the SCA applies to data stored in other countries [386]. Although there is an MLAT in place between the European Union and the United States, the CLOUD Act contemplates that a company served with a search warrant in the United States must make the requested data available to US law enforcement officers outside MLAT procedures. Although it provides that a US judge may modify or annul a warrant based on a comity analysis considering the interests of a "qualifying foreign government", such analysis is not mandatory. Thus, the existence of the MLAT did little to resolve this particular conflict between national interests (in this case, the interest in timely access to electronic data for law enforcement purposes) and international community values.

(c) *Reverting to territorial sovereignty*

Both in public regulation and in private enforcement, one approach to manage the tension between local regulatory goals and international community values is to revitalize a strict compartmentalization of the spheres of regulatory authority along territorial lines. This approach would resuscitate the triangular relationship of territory, sovereignty, and jurisdiction that for many years dominated thinking on international

384. 482 US at 543-544.
385. GDPR, Art. 48.
386. CLOUD Act, S. 2383, HR 4943 (115th Cong. 2d Session 2018). The relevant provision is codified at 18 USC, § 2713.

jurisdictional law. On that traditional view, statehood is defined by reference to particular geographic territory, and jurisdiction – in the sense of a sovereign's authority to regulate particular persons or events – by reference to the location of those persons or events within that territory. As Mann described, "[s]uch a system seems to establish a satisfactory regime for the whole world" [387].

In the United States, the possibility of reversion to such a conception of international jurisdiction has been a major topic of discussion recently, given the resurgence of territorialism in a string of recent Supreme Court decisions. These include the cases on legislative jurisdiction analysed in Chapter III, as well as cases on judicial jurisdiction that take a similar, highly territorialized approach to the allocation of authority [388]. The insufficiency of such a system to the task of regulating a global economy is clear.

Overall, such a shift seems unlikely. In the United States, for instance, the move toward territorialism is happening in the particular context of private enforcement [389]. Recent legislation in the United States clearly recognizes the intertwining of economies and markets, and the concomitant need for non-territorialized conceptions of regulatory methods. The Dodd-Frank Act alone contains multiple provisions that explicitly recognize and address this need. Similarly, statements of regulators in various agencies routinely mention the global nature of the markets they regulate, and the need for effective transnational strategies. The same is true in other countries. In sum, it appears far more likely that a renewal of strict versions of territorial jurisdiction will be limited to particular forms of regulation, rather than taken up more broadly.

C. Intra-regional Conflict

One major development in recent years in the area of economic regulation is the significant expansion in regional lawmaking. As discussed in Chapter II, regional law can take various forms, including instruments with direct application in member States as well as model

387. F. A. Mann, "The Doctrine of Jurisdiction in International Law", 111 *Recueil des cours* (1964), at 30, cited *supra* at footnote 12.

388. See *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 US 873 (2013) ("The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct").

389. Thus, it may best be viewed as related to an internal political problem of separation of powers, to which we will turn below.

laws for member States to consider in enacting local legislation. All regional action, though, implicates the allocation of authority between member States, on the one hand, and the regional lawmaker, on the other. That allocation can give rise to intra-region political conflict, which in turn affects cross-border regulation more generally. This section uses an example from the European Union to illustrate such conflict.

Beginning around the turn of the century, the European Commission laid the groundwork for procedural reform intended to facilitate private enforcement in the area of competition regulation. The Commission was concerned in part with protecting the rights of individuals harmed by Treaty violations to obtain compensation for that harm [390]. It was also cognizant of the fact that as the geographic scope of the common market expanded, public regulation alone was not sufficient adequately to enforce regulatory laws. It thus embarked on a long project to expand private enforcement throughout the common market. In different phases of this process, intra-regional conflicts manifested themselves in different ways.

In the beginning, reform was presented as an essentially top-down process. The Commission published a Green Paper in 2005 that outlined the barriers to effective private enforcement of competition law within the common market [391]. It recognized both the compensatory and the deterrent functions of private enforcement. The White Paper that followed in 2008 criticized the ineffectiveness of antitrust damages actions in European States, and laid out a number of specific policy proposals intended to strengthen private enforcement [392]. This approach presented a political problem. Although the substantive economic laws in question were regional, the only way to strengthen private enforcement was to make changes within the civil justice systems of the individual member States [393].

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390. In 1999, the European Court of Justice held that individuals harmed by anti-competitive conduct had a directly actionable right to compensatory damages. Case C-453/99, *Courage Ltd.* v. *Bernard Crehan*, 2001 ECR 1.

391. Green Paper, Damages actions for breach of the EC antitrust rules, COM(2005) 672, 19 December 2005.

392. White Paper, Damages actions for breach of the EC antitrust rules, COM(2008) 165, 2 April 2008.

393. This principle was later confirmed by the European Court of Justice. *Manfredi* v. *Lloyd Adriatico Assicurazioni SpA*, 2006 ECR I-6641 ("[I]t is for the domestic legal system of each member state . . . to prescribe the detailed procedural rules governing those actions . . .").

As the Commission knew, most member States did not have procedures in place that would support robust private enforcement. Many, for instance, did not permit the sort of evidentiary discovery that would enable a plaintiff to meet the burden of establishing the facts leading to a finding of prohibited behaviour [394]. In addition, they did not utilize various procedural mechanisms, such as class action suits and contingent fee arrangements, that would create the necessary incentives for attorneys to engage in private regulatory litigation. Many member States did not want to make such changes, and responded to the Commission's initiative with strong criticism of the change in enforcement philosophy. They viewed the action of the Commission as an override of their own decisions regarding the shape of their justice systems, in some cases arguing that the Commission's action exceeded the authority that had been granted by member States to the European Union [395].

This tension within the European Union complicated reform in a couple of ways. First, it resulted in a somewhat fragmented process. Many member States did adopt mechanisms to facilitate private enforcement, including new collective action procedures. However, they varied significantly across legal systems, and some States enacted only incremental reform. The resulting patchwork perpetuated the problem that some consumers within the European Union lacked meaningful redress for harm caused by regulatory violations.

In addition to complicating the lawmaking process within the European Union, the initial tension between the Commission and member States affected the transatlantic relationship as well. The Commission responded to the reservations of member States in part by going out of its way to assure them that it did not subscribe to the US model of private enforcement. It cast local reform as a counterpoint to US procedures, to the point of disparaging the American procedural system. This created a somewhat antagonistic attitude that needlessly interferes with the development of transnational regulatory capacity. It heightens the sorts of procedural conflict discussed in Chapter IV by sharpening "public policy" concerns, for instance. It also makes it less

394. See E.-J. Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union* 237 (2003).

395. See B. Hess, "European Perspectives on Collective Litigation", *supra* footnote 322, at 7 (discussing the "resistance of many national governments" to the process of procedural reform).

likely that regulators will seek out useful information and experiences from other legal systems.

Over time, the intra-regional conflict described here dissipated. Procedural reform intended to strengthen private enforcement of competition law, in particular, continued to be a priority of the Commission. In 2014, following initial piecemeal reform in member States, it adopted a directive on antitrust damages actions [396]. The directive's recitations include a lengthy section on subsidiarity [397], explaining why the Commission's objectives cannot be met adequately by the member States and thus must be pursued at the regional level. That explanation refers in part to the special challenges posed by the "trans-national dimension" of Treaty law on competition. The directive resolves any residual conflict between member States and the Commission by simply exercising the preemptive authority of the regional lawmaker; however, in the meantime, member States have largely come to terms with the necessity of reform.

In other regulatory areas, by contrast, the Commission temporized regarding the decision to adopt a top-down approach. In 2013, it issued a non-binding recommendation encouraging member States to adopt full collective action procedures, and appears inclined to let that process unfold at the State level. Interestingly, in this context the momentum for reform seems to coming from the bottom up. In its recent report on progress under the recommendation, the Commission indicated that in its view some States had gone too far in their reform [398].

D. Intra-State Conflicts: Separation of Powers

Another form of political conflict arises not between different levels of government, as in the preceding example, but between different branches of government. In many political systems, no single branch is solely responsible for foreign relations; rather, the activities of multiple branches may from time to time touch upon such matters. In the United States, for instance, while authority over foreign relations lies primarily with the political branches, the process of adjudication routinely involves courts in matters that may affect those relations.

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396. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

397. Directive, Section 3.2.

398. See discussion in Chapter IV, *supra*.

The separation of powers between the judiciary and the executive branch in this regard is expressed in a variety of doctrines and judicial practices, including the doctrine of sovereign immunity [399] and the act of State doctrine [400]. In the area of international economic regulation, the political question doctrine and the judicial practice of deferring to executive action are of particular relevance.

1. The political question doctrine

The political question doctrine limits the justiciability of certain claims. It is anchored in the US Constitution's separation of powers among the branches of government. As the Supreme Court observed in the seminal case of *Marbury* v. *Madison*, certain actions of government constitute political acts that are "[not] examinable in a court of justice" [401]. The doctrine does not bar US courts from considering all matters involving foreign relations, however. In the 1962 voting-rights case *Baker* v. *Carr*, the Supreme Court recognized that many such matters "uniquely demand single-voiced statement of the Government's views" [402], and cited the "potentiality of embarrassment from multifarious pronouncements by various departments on one question" [403]. Yet it called for case-by-case analysis on the question of justiciability:

> "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." [404]

As we have seen, litigation involving the application of US law to foreign conduct often creates significant foreign-relations concerns.

399. Foreign Sovereign Immunities Act of 1976.
400. See *Underhill* v. *Hernandez*, 168 US 250, 252 (1897) ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory").
401. *Marbury* v. *Madison*, 5 US (1 Cranch) 137, 165 (1803).
402. *Baker* v. *Carr*, 369 US 186, 211 (1962).
403. *Ibid.* at 217.
404. *Ibid.* at 211-212.

Those concerns are particularly pronounced in cases against corporations for participating in human rights abuses and other international law violations, which often involve allegations of principal action on the part of foreign military and other State actors. Unsurprisingly, Alien Tort Statute litigation – in which foreign plaintiffs sued both US and foreign corporations for damages caused by such violations – emerged as a primary site for debates about the role of the political question doctrine. Corporate defendants as well as foreign Governments, the latter in *amicus* filings, invoked the doctrine in arguing that litigation in US courts was an inappropriate method to address the human rights implications of corporate activity.

A case brought by Holocaust survivors and their descendants against the Vatican Bank illustrates some of the lines that courts attempt to draw in such cases [405]. That case involved two different types of claims: one set related to lost and looted property, and another related to the Bank's alleged involvement in war crimes during World War II. The court concluded that the political question doctrine barred its adjudication of the latter set of claims, reasoning that such adjudication would require "a retroactive political judgment as to the conduct of war" [406]. It characterized the property claims differently, however, noting that they required simply a determination of whether the Bank was wrongfully holding assets. Although it recognized the "political overtones" in the case, it concluded that "[d]eciding this sort of controversy is exactly what courts do. . . . [T]he underlying property issues are not 'political questions' that are constitutionally committed to the political branches." [407] A dissenting opinion in the case criticized this approach:

> "Our unauthorized transformation of our district courts into an open-door international tribunal far overreaches the authority of [the judicial branch] of our government. This opinion, albeit well-intentioned, extends the concept of judicial authority into unknown territory and mistakenly exercises power and competence that plainly belongs *[sic]* to the President and to Congress." [408]

The political question doctrine is invoked less frequently in the core areas of economic regulation, where the principal question presented in

405. *Alperin* v. *Vatican Bank*, 410 F. 3d 532 (9th Cir. 2005).
406. *Alperin* v. *Vatican Bank*, 410 F. 3d 532 (9th Cir. 2005), 548. See also *Iwanowa* v. *Ford Motor Co.*, 67 F. Supp. 2d 424 (DNJ 1999) (adopting similar reasoning).
407. *Alperin v. Vatican Bank*, 410 F. 3d 532 (9th Cir. 2005), 551-552.
408. *Alperin* v. *Vatican Bank*, 410 F. 3d 532 (9th Cir. 2005), 570 (Trott, J., dissenting in part).

most cross-border cases is simply whether or not the plaintiff's claims fall within the scope of the relevant law. Nonetheless, the doctrine is raised from time to time in antitrust cases. In that context, the doctrine bars US courts from adjudicating an antitrust claim between private parties only if the claim in question is directly linked to a question of US foreign policy. On a few occasions, for instance, US courts have considered claims brought against oil companies, alleging that the companies had conspired with OPEC States in setting oil prices [409]. In each case, the court concluded that adjudicating the claims would interfere with the executive branch's approach of "pursuing diplomatic efforts by the United States with oil-producing nations" [410].

In less unusual policy contexts, however, such claims generally fail. In one representative case, British Airways invoked the political question doctrine in seeking dismissal of antitrust claims asserted against it by a competitor. The court rejected the argument out of hand:

> "The only potential 'embarrassment' British Airways identifies is that the United States and the United Kingdom are engaged in 'ongoing and difficult' negotiations [over an agreement regulating U.S.-U.K. air service]. . . . [T]his is not a controversy which 'revolves around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch'. The fact that this case may involve international agreements and may brush against foreign relations does not render it nonjusticiable." [411]

In 2012, the Supreme Court revisited the political question doctrine [412]. It adopted a narrower formulation of the non-justiciability standard that focuses on only two factors relating to the claim at issue: whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it" [413]. In such cases, the Court concluded, courts lack the authority to resolve the disputes before them. The opinion did not mention other grounds for

409. See, e.g.,, *Spectrum Stores, Inc.* v. *Citgo Petroleum Corp.*, 632 F. 3d 938 (5th Cir. 2011); *In re Refined Petroleum Products Antitrust Litigation*, 649 F. Supp. 2d 572 (SD Tex. 2009).

410. 649 F. Supp. 2d at 598.

411. *Virgin Atlantic Airways Ltd.* v. *British Airways PLC*, 872 F. Supp. 52, 60 (SDNY 1994) (internal citation omitted).

412. *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 US 189 (2012).

413. *Ibid.* at 195.

abstaining from hearing a case, such as the general risk of interference with foreign policy discussed above. In the future, then, it seems even less likely that a court would abstain on this basis from resolving a claim brought under regulatory law.

2. *Judicial deference to the political branches*

Outside the context of justiciability, separation of power concerns arise in a number of other ways in cross-border regulatory cases. Although these concerns often lead to a restriction of judicial engagement in the transnational arena, that is not always the case.

(a) *In connection with the exercise of legislative jurisdiction*

Separation of powers concerns have historically been cited as one of the justifications for the presumption against extraterritoriality, which militates against the application of US law when the intent of Congress is not clear [414]. In its 2013 decision in *Kiobel*, for instance, the Supreme Court noted that "[t]he presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches" [415]. In this way, by supporting an expansive role for the presumption, deference to the political branches reduces the likelihood that courts will apply domestic law to cases with significant foreign elements.

Conversely, though, in situations in which the presumption against extraterritoriality has been overcome, many courts and commentators invoke separation of powers concerns in arguing *against* the application of comity or "reasonableness" analysis to defer to foreign sovereign interests. In the *Laker Airways* litigation, for instance, the DC Circuit Court of Appeals rejected interest balancing as an appropriate method of avoiding conflict, partly on separation of powers grounds:

> "Although, in the interest of amicable relations, we might be tempted to defuse unilaterally the confrontation by jettisoning our jurisdiction, we could not, for this is not our proper judicial role. The problem in this case is essentially a political one, arising

414. See *supra* (Chapter III).

415. *Kiobel* v. *Royal Dutch Petro. Co.*, 569 US 108, 115-116 (2013). See also *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 US 138, 147 (1957).

> from the vast difference in the political-economic theories of the two governments which has existed for many years. Both nations have jurisdiction to prescribe and adjudicate. Both have asserted that jurisdiction. However, this conflict alone does not place the court in a position to initiate a political compromise based on its decision that United States laws should not be enforced when a foreign jurisdiction, contrary to the domestic court's statutory duty, attempts to eradicate the domestic jurisdiction. Judges are not politicians. The courts are not organs of political compromise." [416]

In this context, then, the separation of powers is invoked in a way that expands the circumstances in which courts will apply domestic law to cases with significant foreign elements. Proponents of the position outlined in *Laker* point to a number of differences between the role of the judiciary and the role of the political branches that justify this position. For instance, courts cannot negotiate directly with other jurisdictions; therefore, any decisions made to accommodate foreign interests on a case-by-case basis may not yield reciprocal treatment by foreign courts. Consequently, courts are not well situated to achieve long-term co-operation with other States on the allocation of regulatory jurisdiction. In addition, judicial efforts to balance domestic and foreign interests might interfere with efforts by the political branches to negotiate bilateral or multilateral co-operation agreements with other States. If the interests of those States are already being accommodated by US courts, the argument goes, then they may lack incentive to enter into such arrangements [417].

This position has clearly gained traction in recent years, as evidenced by the Supreme Court's evolving position on legislative jurisdiction. In the recent line of cases, concern over separation of powers has been used to justify the new approach to the presumption against extraterritoriality. That approach does two things relevant to this discussion. First, by strengthening the presumption, it puts the burden almost entirely on Congress to decide the geographic scope of legislation [418]. Second, it indicates that where the presumption has been overcome, courts should

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416. *Laker Airways Ltd.* v. *Sabena*, 731 F. 2d 909, 953 (DC Cir. 1984).

417. W. Dodge, "Extraterritoriality and Conflict-of-Laws Theory : An Argument for Judicial Unilateralism", 39 *Harvard International Law Journal* 101 (1998), at 63.

418. Administrative agencies also play a role in interpreting the relevant regulatory statutes. Under prevailing doctrines of judicial deference, courts would generally defer to an agency's interpretation of the statute under which it operates – thus again reducing the role of courts in deciding the geographic scope of legislation.

simply apply US law without engaging in further analysis. This step similarly reduces the judiciary's role in considering the "political" aspects of transnational regulation.

It is worth noting that this is something of a shift from the way in which at least some courts in the past conceptualized their role in the transnational arena. Some older (and now overruled) cases in the area of securities regulation included passages in which the courts contemplated a more active judicial role in the transnational regulatory arena. In one case, for instance, the court applied US securities law to a fraud that had occurred in the United States, although it was perpetrated by a foreign corporation and the sole victim was also a foreign corporation [419]. The court stated that

> "[w]e are reluctant to conclude that Congress intended to allow the United States to become a 'Barbary Coast', as it were, harboring international securities 'pirates'. . . . By finding jurisdiction here, we may encourage other nations to take appropriate steps against parties who seek to perpetrate frauds in the United States. Accordingly, our inclination towards finding jurisdiction is bolstered by the prospect of reciprocal action against fraudulent schemes aimed at the United States from foreign sources." [420]

Courts like this saw themselves as participating in a project of reciprocity with other countries – something of a global perspective [421].

(b) *In exercising judicial discretion*

Political considerations also play a role in prompting judicial deference in the case of claims that are not barred by the political question doctrine, but that implicate interests of the political branches. In such cases, those branches may formally intervene in the litigation (for example, by submitting a statement expressing their views), or express their views more informally. Sometimes they do so simply to clarify their position on a particular issue, but in certain circumstances they explicitly encourage courts to abstain from hearing the relevant claims. In a number of cases arising out of the alleged participation

419. *SEC* v. *Kasser*, 548 F. 2d 109 (CA NJ 1977).
420. *Ibid.* at 116.
421. This observation does not speak to whether the court was right or wrong to apply domestic law given the facts at issue. It simply notes that the court saw itself as an actor on the global stage, along with the political branches.

of various companies in World War II-era forced labour practices, for example, the US State Department submitted a Statement of Interest encouraging dismissal of the plaintiffs' claims in light of foreign policy concerns [422]. The question the courts confronted was whether they should defer to the views of the political branches and therefore decline to hear the claims [423].

In virtually all of the forced labour cases, the court concluded that comity considerations required it to dismiss the claims, in part on the basis of that Statement of Interest. One representative decision highlights the internal separation of powers concerns at play in the case :

> "Our Executive branch has clearly articulated that it would be in the foreign policy interest of the United States for legal effect [to] be given to the German Foundation Law. A clear conflict exists between that application of that law, and the continuation of legal proceedings in courts of the United States. . . .
>
> The Statement of Interest lends support to the proposition that [such] claims ... should be (and have always been) resolved by the political branches. If the Court were to allow this case to proceed to trial, it would be a declaration to the Executive branch that more than fifty years of treaties, agreements, and other foreign policy determinations . . . are unacceptable or otherwise inadequate, and that by allowing this litigation to continue the Court could somehow provide a more appropriate remedy." [424]

In these ways, domestic separation of powers concerns affect the role that US courts play in regulating cross-border activity.

422. In particular, the State Department argued that an alternative mechanism for resolving such claims had recently been established, a point to which we will return below.

423. That result could be achieved by dismissing the claims on the basis of *forum non conveniens*, for example, or on the basis of comity.

424. *In re Nazi Era Cases against German Defendants Litigation*, 129 F. Supp. 2d 370 (DNJ 2001), at 388-389.

CHAPTER VI

IMPROVING THE FUNCTION OF PRIVATE ENFORCEMENT IN TRANSNATIONAL ECONOMIC REGULATION

A. Introduction

The previous chapters explored different forms of conflict that arise in the cross-border enforcement of regulatory law: conflicts of substantive law, conflicts of procedural law, and political conflict. Depending on factors such as the particular law being applied, or the nature of the relevant regulating institution, some regulatory processes create only minimal conflict. Others, however, may generate conflict across all categories.

If one were to align regulatory processes along a spectrum with low conflict on one end and high conflict on the other, a public investigation of a multinational cartel would be placed at the low end. Such an investigation is likely to be conducted within the framework of a co-operation agreement between regulatory agencies, and so would create little procedural conflict. Moreover, it would involve the application of a widely shared norm prohibiting price-fixing, and so would create no substantive conflict. A claim brought by an individual plaintiff against a foreign defendant for damages caused by that price-fixing, on the other hand, would fall more in the middle of the spectrum. Although the elements of such a cause of action are common to most competition regimes, the applicable law might confer a remedy, such as treble damages, that is not. Moreover, the procedural rules followed in the litigation would likely create additional conflict. A full-blown opt-out class action brought against a foreign defendant for securities fraud would be at the high-conflict end. Such a case would likely create a conflict of substantive laws as well as more serious procedural and political conflict.

As the exploration of this layering of conflict has already suggested, the private enforcement of regulatory law tends to create the most significant conflict in cross-border regulation. In the US system, this has already contributed to a scaling back of private enforcement in transnational cases. The Supreme Court has repeatedly cited concerns over the special conflicts that private enforcement presents as partial

justification for limiting the geographic scope of regulatory law, most explicitly in the *RJR Nabisco* case [425]. To some degree, the fact that the system with the longest-standing commitment to private enforcement has lately circumscribed the role of transnational regulatory litigation might cast doubt on its future as an effective regulatory tool. However, other indications suggest its continuing importance.

First, the trend in the United States must be seen as part of a broader shift within the US civil justice system more generally: the erosion of private rights of action. A series of Supreme Court decisions over the past decade has erected numerous barriers for plaintiffs seeking to vindicate their legal rights. For instance, these decisions have increased pleading requirements, making it more difficult for plaintiffs to defeat motions for failure to state a claim upon which relief can be granted [426]. They have expanded the enforceability of contractual waivers of collective action [427]. They have also made it more difficult for plaintiffs to establish the requirements for class certification [428]. Recent legislative reform, including the Private Securities Litigation Reform Act of 1996 and the Class Action Fairness Act of 2005, has also aimed at curbing the use of class action procedures. In this light, reducing access to US courts for the resolution of transnational claims may simply be another step in "'the Court's continuing campaign to render the private cause of action . . . toothless'", as Justice Stevens suggested in his concurrence in *Morrison*, there referring to the cause of action for securities fraud [429]. Because motivations entirely apart from the desire to avoid international conflict may be contributing to the retrenchment, it should not necessarily be read as evidence that private enforcement cannot be effective on the transnational plane.

Second, other countries are actively developing mechanisms to support private enforcement [430]. Whether or not designed with multinational cases in mind, some of those mechanisms have been used effectively in the cross-border context. For instance, several multinational settlements have been approved pursuant to the Dutch WCAM;

425. See Chapter III.
426. See *Bell Atlantic Corp.* v. *Twombly*, 550 US 544 (2007); *Ashcroft* v. *Iqbal*, 556 US 662 (2009) (both elevating the requirements for factual pleadings).
427. See *AT&T Mobility LLC* v. *Concepcion*, 563 US 333 (2011) (enforcing a class arbitration waiver in a consumer contract).
428. See *Wal-Mart Stores, Inc.* v. *Dukes*, 564 US 338 (2011) (making it more difficult for plaintiffs to establish the commonality of claims necessary to obtain class certification).
429. 561 US 247, at 286 (Stevens, J., concurring).
430. See discussion in Chapter IV, *supra*.

similarly, Canadian courts have certified multinational class actions. These developments have already led to speculation that hubs of transnational litigation may emerge to replace the United States [431]. Thus, we may be entering a period of recalibration, in which private enforcement processes diffuse, in different forms, across multiple legal systems.

Certainly, any proposals to support the use of private enforcement in cross-border regulation must address the debates regarding its effectiveness in the domestic context.[432] Critics identify a number of potential drawbacks to private enforcement regimes, many of which relate to their inherently decentralized and uncoordinated nature. As one account notes,

> "private litigants select and frame issues, thus setting the judicial policy agenda, in the course of pursuing highly particularized interests. These interests, and the associated policy positions being advocated, inevitably will be divergent across private plaintiffs and private attorneys, and they may not correspond with, and in fact may be in competition with, the public interest" [433].

The resulting risk is that policy will develop in a piecemeal and sometimes incoherent fashion. Associated problems include diminished oversight capacity within the political branches and a lack of democratic accountability [434].

Other criticisms of private enforcement focus more on the incentives that support its use in particular regulatory sectors – most prominently, treble damages. Particularly in the area of antitrust law, commentators have proposed other methods to achieve appropriate levels of deterrence. These include increasing the amount of public fines for violations, on the grounds that such increases are a costless way to increase enforcement [435],

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431. See, e.g., T. Monestier, "Is Canada the New Shangri-La of Global Securities Class Actions?", 32 *Northwestern Journal of International Law and Business* (2012), 305; X. Kramer, "Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries", 27 *Pacific McGeorge Global Business and Development Law Journal* (2014), 235.

432. See generally R. Posner, "Regulation (Agencies) versus Litigation (Courts): An Analytical Framework", in D. Kessler, ed., *Regulation versus Litigation: Perspectives from Economics and Law* (2011), 11-26. For a recent synthesis of the literature on public versus private enforcement in the United States, see M. Lemos, "Privatizing Public Litigation", 104 *Georgetown Law Journal* 515 (2016), at 524-530.

433. Burbank *et al.*, *supra* footnote 45, at 668.

434. *Ibid.* at 669.

435. See W. Breit and K. Elzinga, "Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages", 17 *Journal of Law and Economics* (1974), 329.

as well as imposing criminal sanctions on individuals responsible for particularly egregious violations of regulatory law [436]. The use of class actions to leverage the effectiveness of private enforcement likewise has many detractors; as explored above, their critiques focus on the perceived risk of abuse by unscrupulous plaintiffs.

These debates are not settled. However, legislators in many legal systems, considering the expansion in scale of populations and of economic activity, have chosen to strengthen private enforcement mechanisms. This ongoing adoption of private enforcement in additional legal systems is itself a strong indicator of its effectiveness. It also corresponds with the results of a number of empirical analyses concluding that public enforcement alone insufficiently deters certain forms of misconduct [437]. Likewise, public agencies have voiced their support for the role that private enforcement can play in supplementing their own resources to detect and prosecute unlawful conduct [438].

Transposed to the global scale, the arguments in favour of private enforcement are even more compelling. As discussed in Chapter I, the harms caused by various forms of economic misconduct are enormous. Moreover, multinational enterprises have proved adept at operating in the gaps between legal systems. It is not evident that public regulatory bodies have adequate resources, or could secure adequate resources, to achieve appropriate levels of prosecution and deterrence in this climate [439]. Even with a clear view of the most pressing domestic regulatory needs, most countries are unable to mobilize support within their fiscal bureaucracies for generous funding of their public agencies. It will surely be harder still to convince those bureaucracies to provide more funding in order to enable those agencies to work in concert with others to improve global regulation. For private enforcement to address

436. See, e.g., Enterprise Act 2002 (United Kingdom), establishing a criminal offence for participation in certain forms of hard-core violations of antitrust law. Others disagree. See R. Lande and J. Davis, "Comparative Deterrence from Private Enforcement and Criminal Enforcement of the US Antitrust Laws", 2011 *BYU Law Review* 315 (2011), at 317 (concluding that "private antitrust enforcement probably deters more anticompetitive conduct than the DOJ's anti-cartel program").

437. In the area of cartels, for instance, see F. Smuda, "Cartel Overcharges and the Deterrent Effect of EU Competition Law", 10 *Journal of Competition Law and Economics* 63 (2012) (a regional study concluding that the gains from price-fixing outweigh expected punishments).

438. J. Rathod and S. Vaheesan, "The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View across the Atlantic", 14 *University of New Hampshire Law Review* (2016), 303.

439. See Hess, *supra* footnote 322, at 8, querying whether national authorities in Europe have enough "working power" to investigate and sanction cartel violations.

these challenges effectively, though, its role in the overall system of economic regulation must be optimized.

The following sections consider two possible strategies for doing so. The first focuses on the role of private enforcement in hybrid *systems* – that is, legal regimes that utilize both public and private enforcement resources. It investigates whether private litigation could be more strategically incorporated into the overall scheme of economic regulation. The second focuses on hybrid *mechanisms* – that is, individual enforcement processes that blend public and private elements. It inquires whether such mechanisms might be utilized to address cross-border regulatory violations.

B. Hybrid Systems: Improving the Integration of Public Regulation and Private Enforcement

As the previous chapters demonstrate, private enforcement is often conceptualized as a useful but problematic supplement to public regulation. Its use in cross-border cases is not nearly as widely accepted as public regulatory action. This section explores what it might take to integrate private and public enforcement processes more effectively, thus permitting a more active role for domestic courts as participants in global regulation.

1. Structural interactions between public and private enforcement

In systems that incorporate private enforcement, we must pay attention to the points at which public and private systems overlap. As a starting point for thinking about the structural interactions of private litigation and public regulatory activity, consider some of the overlaps that occur when a private lawsuit follows on a public investigation. Is evidence that is provided to public regulators also accessible by private plaintiffs? In a lawsuit that follows on a public regulatory proceeding, may private plaintiffs rely on findings of fact from the public investigation? And so forth.

Within individual legal regimes, these questions can be addressed through legislation or rulemaking. For example, the EU Regulation on the implementation of competition law[440] provides that courts

440. Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

of the member States considering private claims arising out of anti-competitive conduct may request information that is in the Commission's possession as a result of a public investigation [441]. It further provides that national courts hearing such claims cannot render decisions that are incompatible with public proceedings already undertaken regarding the same activity [442]. In the United States, likewise, various statutes address some of these overlaps. The Clayton Act, for example, states that a plaintiff in a civil antitrust proceeding may rely on the factual findings in a prior civil or criminal proceeding against the defendant initiated by the Government [443].

Similar steps could be taken in the cross-border context – for instance, in the bilateral memoranda of understanding between regulatory agencies in different jurisdictions. In this way, at least some of the potential friction between public and private enforcement, even in the transnational context, could be addressed in legislation or in other forms of rulemaking. But these are relatively small mechanical steps, and can eliminate a few but not many of the conflicts caused by private regulatory litigation.

2. *Functional conflicts between public and private enforcement*

Specific functional conflicts arise frequently between private enforcement and other forms of regulation – both within a single State, and also across regimes. This type of conflict is more difficult to address. The following sections describe two illustrations of this sort of conflict, one focusing on the regulation of human-rights impacts of business and one on leniency programmes.

(a) *Business and human rights*

One illustration of such conflict is a set of claims brought in US courts against multinational corporations, alleging their participation in economic activity supporting the South African apartheid regime [444]. The South African Government objected to the adjudication of such claims in a US court. It did so partly on the basis that the involvement of the US courts would violate its right as a sovereign Government to

441. Council Regulation (EC) No. 1/2003, Art. 15 (1).
442. Council Regulation (EC) No. 1/2003, Art. 16 (1).
443. 15 USC, § 16 *(a)*.
444. *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (SDNY 2004).

deal with the legacy of apartheid itself. But South Africa also objected because the threat of civil liability in US courts might deter the corporations from participating in the process set up by its Truth and Reconciliation Commission. That process sought confessions by the corporations involved that they had supported apartheid, to be followed by forgiveness for their acts. But no corporation would confess to supporting apartheid if it knew that doing so would subject it to civil liability in another country; thus, the potential litigation of the claims in US courts interfered with the regulatory mechanism set up in South Africa.

In another example of this problem, US courts addressed many private claims seeking compensation for the misconduct of corporations during the Nazi era. These claims alleged a range of unlawful practices, from forced labour to property theft. The wave of lawsuits against German corporations and the German Government led to the execution of an agreement between Germany and the United States intended to secure a "legal peace". This agreement created the Foundation "Remembrance, Responsibility, and the Future" [445]. Funded by contributions from German corporations and the German Government, the Foundation provided a forum in which World War II-era claims would be heard. For its part, the US Government agreed to take all possible action to encourage US courts to dismiss relevant actions, steering them toward resolution by the Foundation. The agreement did not require the outright suspension of litigation in the United States, however, and so in a number of cases the plaintiffs continued to press their claims.

In general, and consistent with what we learned of political conflict in Chapter V, US courts expressed reluctance to step into the debate over the most appropriate method to resolve these claims. Many of them viewed the question as one of justiciability. One court considering forced-labour claims, for example, concluded that the executive agreement regarding the Foundation "is a pronouncement by our government that claims against German Industry should not be litigated, but instead should be submitted to the Foundation". On that basis, it concluded that adjudication of private claims was barred by the political question doctrine [446]. Other courts considering claims arising out of actions during World War II concluded that the agreement did not

445. Agreement concerning the Foundation "Remembrance, Responsibility and the Future", 39 *International Legal Materials* 1298 (2000).

446. *In re Nazi Era Cases against German Defendants Litigation*, 129 F. Supp. 2d 370 (DNJ 2001), at 383.

render the claims non-justiciable, but that comity concerns militated in favour of deference to the executive branch [447]. In all of these cases, though, the stated concern was not merely one of interference with foreign relations. It was also a functional question. One of the agreements establishing the Foundation explicitly made Germany's contributions to the Foundation conditional upon the dismissal of all "pending and future WWII-era claims" in US courts [448]. Thus, the issue was in part whether the private claims would interfere with the other reparations mechanisms that had been established by the Governments.

Because the foregoing examples draw on cases in the area of business and human rights, it is important to emphasize that the Supreme Court's recent extraterritoriality jurisprudence has significantly restricted access to US courts in that particular arena. The *Kiobel* case discussed in Chapter III bars litigation under the Alien Tort Statute of claims arising out of conduct in foreign countries, which represent the vast majority of human rights-based claims. Moreover, the Court's 2018 decision in *Jesner* v. *Arab Bank, PLC* foreclosed all suits under the ATS against foreign corporations [449]. Thus, this specific form of functional conflict is less likely to occur in the future.

(b) *Leniency programmes*

(i) *In cartel regulation*

Public regulators often utilize leniency or amnesty programmes to encourage whistle-blowing in cases of unlawful conduct. In the area of cartel regulation, such programmes are an important element of public enforcement strategy. Because cartels depend on necessarily secretive arrangements, uncovering evidence of their existence and activities is often difficult. In many legal systems, competition enforcement agencies therefore offer immunity from prosecution, or relief from civil penalties, to those who first supply evidence leading to the prosecution of a cartel. These amnesty programmes are frequently credited by regulatory agencies as the single most effective tool they have to detect violations of the law. However, the amnesty granted in connection with a leniency agreement does not protect conspirators from private damages

447. See, e.g., *Ungaro-Benages* v. *Dresdner Bank AG*, 379 F. 3d 1227 (11th Cir. 2004), at 1239 (claims alleging theft of interest in a manufacturing company).
448. Berlin Accords, Preamble, para. 13, and section 4 *(b)*.
449. 138 S. Ct. 1286 (2018).

actions that might follow on public investigations for the harms caused by their conduct. Potential whistle-blowers carefully assess their aggregate exposure to civil damages awards before deciding whether or not to report violations in exchange for amnesty.

If the likely liability that a potential whistle-blower would incur in follow-on litigation is too great, that party might decide that it outweighs the benefits of amnesty. For this reason, robust private enforcement may undermine rather than supplement public regulation. In the United States, the focal point of this tension in the past was the availability of treble damages in private antitrust litigation [450]. Concerned that the prospect of treble-damages judgments was suppressing participation in amnesty programmes, public regulators argued for the elimination of trebling in litigation that followed a successful public investigation [451].

A different form of friction between amnesty programmes and private litigation arises in Europe, and relates to the treatment of evidence supplied to the Commission by amnesty applicants. As discussed in Chapter IV, the ordinary rules of evidence gathering in most European systems do not require parties in civil litigation to disclose evidence adverse to their own positions. This created the concern that self-incriminating evidence provided to public authorities in connection with an amnesty application might subsequently be obtained by plaintiffs in follow-on private litigation against the applicant. The risk of a less favourable position in such litigation, and therefore a greater exposure to civil liability, might deter potential applicants from participating in leniency programmes. Concerned with the effectiveness of those programmes, the Commission's position was that leniency documents should never be disclosed to private claimants; however, in 2013 the European Court of Justice declined to endorse an absolute ban on such disclosure. It held that national courts should weigh the various interests for and against disclosure on a case-by-case basis [452].

(ii) *Anti-bribery regulation*

In 2017, the US Department of Justice announced a new enforcement policy for the Foreign Corrupt Practices Act. Under the new guidance, a

450. See *infra* for the legislative resolution of this particular issue.
451. This concern has since been addressed in legislation, as discussed *infra*.
452. *Bundeswettbewerbsbehörde* v. *Donau Chemie*, Case C-536/11, 6 June 2013. The Commission responded by addressing this concern in the 2014 directive on antitrust damages; see *infra*.

company that self-reports misconduct, co-operates fully with the agency, and remediates its misconduct enjoys a presumption that the Justice Department will decline criminal prosecution [453]. As commentators have already observed, this new policy creates the risk of tension between the Justice Department and the Securities and Exchange Commission, which shares jurisdiction to regulate certain FCPA violations by public companies. The Justice Department's decision to decline criminal prosecution (which is made public) does not preclude the SEC from launching civil proceedings against the company – which the SEC might do based on information the company disclosed to seek criminal immunity. Indeed, such a situation is not unlikely, since the SEC bears a lesser burden of proof than the Justice Department in establishing civil violations. This risk alone might limit the effectiveness of the Justice Department's approach.

Moreover, the Justice Department's new policy creates another conflict between public and private enforcement. Unlike the antitrust laws, the FCPA does not create a private right of action for persons harmed by a violation [454]. However, following the conclusion of public enforcement proceedings involving bribery, the shareholders of a company may bring derivative litigation on behalf of the corporation against the officers found guilty of the bribery. If the bribery's revelation diminishes the company's stock price, investors can also initiate securities fraud claims. For instance, in a number of cases, plaintiffs have alleged that an issuer fraudulently overstated sales by including transactions dependent on unlawful bribery [455]. The availability of such follow-on litigation may deter companies from co-operating fully with public enforcement authorities in the initial stages of investigations.

(iii) *Mitigating functional conflict*

On the purely domestic front, instrumental conflicts of this kind can be addressed through targeted legislation. In 2004, for example, the US Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) [456]. That law significantly increased the maximum penalties for antitrust violations, thus strengthening public

453. See United States Attorney's Manual (USAM) Insert, § 9-47.120.
454. Courts have repeatedly declined to imply such a right of action. See, e.g., *Lamb v. Phillip Morris*, 915 F. 2d 1024 (6th Cir. 1990).
455. See, e.g., *In re Faro Tech. Sec. Litig.*, 534 F. Supp. 2d 1248 (MD Fla. 2007).
456. Pub. L. No. 108-237, 118 Stat. 661 (2004).

enforcement processes. At the same time, it eliminated some of the disincentives described above by limiting the damages available in civil antitrust suits to compensatory damages where the conduct in question was covered by a leniency agreement with the Antitrust Division [457]. It also limits those damages to a leniency recipient's pro rata share of the harm caused by the entire cartel, thus eliminating the joint liability among co-conspirators that is otherwise available in private actions. In the European Union, the 2014 directive on damages in antitrust cases bars national courts from ordering any party to disclose the evidence provided to public regulators in connection with a leniency application [458]. By such means the balance of incentives between leniency agreements and exposure to follow-on damages in civil suits can be adjusted.

In the inter-State context, however, resolving these forms of conflict is significantly more difficult. First, consider the question of assessing potential liability in follow-on litigation. Plaintiffs frequently bring private lawsuits arising out of cartel violations as class actions, representing all purchasers harmed by the price-fixing. A defendant's aggregate exposure in such a lawsuit therefore depends on the size of the class. If a class included foreign as well as US purchasers, the class size might increase to the point that the litigation risk to cartel participants would outweigh the perceived benefit of self-reporting. Indeed, even uncertainty as to whether or not foreign purchasers would be included at the class certification stage might create the same disincentive. Importantly, this disincentive would affect not only a decision to self-report to US authorities, but to self-report to authorities in other countries as well.

Public authorities both in the United States and in a number of European countries made this point as *amici curiae* in litigation against participants in a global vitamins cartel in the early 2000s. In that case, the Supreme Court considered whether US antitrust law applied to the claims of plaintiffs who had purchased price-fixed vitamins outside the United States. If so, those plaintiffs could have joined the class action initiated by US purchasers of the goods, thus increasing the overall size

457. Section 213.

458. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, Art. 6 (6) (barring the disclosure of leniency statements and settlement submissions).

of the class. The public agencies reviewed the disincentives to self-reporting created by follow-on civil liability. They argued that

> "[t]hese disincentives become overwhelming when treble damages are made available not only to U.S. consumers, but also to all consumers around the world. At that point, the prospect of ruinous civil liability in U.S. courts far outweighs the benefits most companies would receive from participating in an amnesty program" [459].

The Court referred to this argument in its decision, observing that allowing foreign plaintiffs to

> "pursue private treble-damages remedies would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty" [460].

In this way, private enforcement in the United States risks interference with public enforcement efforts in other countries, not just in the United States. This sort of interference is more difficult to address, since it cannot be resolved by domestic regulation calibrating the relationship between public and private regulation.

A similar cross-border complication arises in connection with the treatment of evidence in public and private proceedings. In the United States, discovery rules often require the disclosure in civil litigation of evidence adverse to the litigant's position. As a result, the level of confidentiality afforded to evidence submitted to public authorities in connection with a leniency application does not significantly affect the applicant's litigation posture in the inevitable follow-on litigation in US courts [461]. (Indeed, under another provision of ACPERA, the leniency applicant is *required* to provide all relevant documents, along with other evidence, to civil litigants in follow-on actions [462].) For this reason, amnesty applicants in the United States do not worry much about the confidentiality of the evidence they provide to public regulators.

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459. Brief of the Governments of the Federal Republic of Germany and Belgium as *Amici Curiae* in Support of Petitioners, *F. Hoffman-La Roche Ltd.* v. *Empagran, S.A.*, 2004 WL 226388 (Supreme Court), *29-30.

460. 542 US 155, at 168.

461. In the United States, any cartel conviction constitutes "prima facie evidence" of wrongdoing in follow-on private lawsuits against those convicted. 15 USCA, § 16 *(a)*.

462. Section 213 *(b)*.

However, if the evidence supplied to US regulators were shared with regulators in other countries, and later disclosed, it might impair the applicant's position in subsequent civil litigation there. This, again, would create a disincentive to self-report. As a result, public authorities must not only guarantee confidentiality internally, but ensure that the information will not be shared across systems.

In addition, recall from the discussion in Chapter IV that 28 USC § 1782 authorizes U.S. courts to order the production of evidence within the United States for use in foreign tribunals. That tool might be used to uncover evidence available in the United States, under the generous US approach to discovery, for deployment in litigation overseas. In one case illustrating this strategy, a company filed a complaint against a competitor with the European Commission, triggering an investigation under EU competition law. The complainant had urged the Commission to seek discovery of certain documents that the competitor had produced in an earlier US lawsuit, which the Commission declined to do. The complainant then applied directly to a US federal court, seeking an order compelling production of the documents for use in the Commission proceeding [463]. In an *amicus* brief, the European Commission articulated its concerns regarding the potential interference in its own public enforcement activities that might result:

> "Of paramount importance are documents submitted to the Commission under its Leniency Program by cartel participants who confess their own wrongdoing. If the Commission were deemed a 'tribunal' in the competition context, it could find itself no longer able to guarantee the confidentiality of those Leniency Program confessions by, *inter alia*, resort to the law enforcement privilege wherever necessary. Companies make delicate balancing judgments in deciding to come forward under the Leniency Program, and any enhanced risk of public disclosure of their confessions will deter their participation. Section 1782 as read by the Ninth Circuit thereby threatens to undercut the effectiveness of the Commission's Leniency Program." [464]

The Supreme Court concluded in the case described above that the Commission was indeed a "tribunal" within the meaning of Sec-

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463. *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 US 241, 250-251 (2004).

464. Brief of *Amicus Curiae* the Commission of the European Communities Supporting Reversal, *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 2003 WL 23138389 (2003), at *15.

tion 1782. Although it confirmed that US courts could take foreign sovereign interests into account when considering whether or not to provide the assistance requested, that consideration takes place on a case-by-case basis [465]. This particular form of conflict has therefore not been definitively resolved.

C. Hybrid Mechanisms

The proliferation of private enforcement regimes among national legal systems will increase overall capacity in the area of economic regulation. It will almost certainly make regulation on the national scale more effective, by increasing both compensation and deterrence. By attending to the sorts of structural and functional interactions with public regulation discussed above, it may also be possible to improve the effectiveness of private enforcement on the transnational scale. Nevertheless, simply because regulatory litigation follows local procedures and, almost always, relies on the application of local law, its use to regulate transnational wrongs – such as global cartels, or accounting fraud within multinational enterprises – will inevitably generate cross-border conflict.

Traditional private enforcement regimes also permit a few regulatory deficiencies to persist. To the extent that transnational activity results in multiple private enforcement actions in different countries, the result is a duplication of litigation costs. Moreover, because not all systems maintain effective systems of private enforcement, only a subset of the persons harmed by particular activity will receive compensation. This in turn has three negative consequences.

First, in situations where the conduct in question violates a widely-shared regulatory norm – for instance, hard-core price fixing – there is inherent unfairness in compensating only a subset of the victims of the same behaviour.

Second, in a territorialized regime, where each legal system secures compensation only for local victims of economic misconduct, the brunt of the losses caused in transnational cases will be felt in developing countries. States in developing regions often lack the resources to regulate economic activity within their markets effectively – because their laws are not developed, because they lack sufficient enforcement resources, or some combination of these factors. That lack of effective

465. *Intel* at 264-265.

regulation can have significant effects on their economic development. The impact of price-fixing cartels on developing economies, for instance, has been well documented. As one commentator has observed,

> "Overcharges allow for the misallocation of resources from more productive uses. . . . Where countries have fewer resources, the misallocation of these resources may limit opportunities for economic growth. Inputs for various products or services may be higher as a result of international cartels. This may lead to an increased cost of production in a country, making it less competitive for foreign direct investment from other countries." [466]

Third, if too many victims are unable to secure compensation, the likely result will be under-deterrence, at the global level, of unlawful behaviour. As a result of the enforcement deficits just described, in the case of conduct such as global price-fixing or cross-border securities fraud that affects multiple jurisdictions simultaneously, some of the activity's effects will go unremedied. This means that even if other States do prosecute regulatory violations – imposing fines or ordering the payment of damages in connection with transactions occurring in their markets – the actors may still realize net gain from their conduct [467]. If that is the case, such activity will continue.

The following section explores the possibility of using hybrid mechanisms – regulatory devices that combine some of the functions of private enforcement with public administration – to address these residual deficiencies. It begins by examining the operation of existing hybrid mechanisms within domestic legal systems. It then considers whether similar tools might be implemented in (or designed for) transnational regulation.

1. Examples of existing hybrid mechanisms

(a) Qui tam *actions*

Under the False Claims Act [468], private individuals may initiate lawsuits against contractors who have committed fraud against the

466. D. Sokol, *supra* footnote 372, at 55.

467. A group of economists made this argument as *amici curiae* in the Empagran antitrust litigation. See Brief of *Amici Curiae* Economists Joseph E. Stiglitz and Peter R. Orszag in Support of Respondents, *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, No. 03-724.

468. 31 USC, §§ 3729-3733.

Government. The private individual need not have suffered harm in order to bring the claim – rather, in the nature of whistle-blowing, the individual brings the claim to the attention of, and in the interest of, the Government itself. Once such a lawsuit has been filed, the Department of Justice may intervene and participate in the litigation. If it chooses to intervene, the Government then assumes primary responsibility for the litigation, although the *qui tam* plaintiff remains a party. In such cases, the private plaintiff recovers an award of between 15 and 25 per cent of any eventual recovery, along with attorneys' fees. If the public prosecutors decide not to participate, the individual may go forward with the lawsuit alone, and would then recover a higher percentage of any recovery. The remainder would be paid into the public fisc [469].

The sole purpose of the *qui tam* action is to deploy additional investigatory resources to uncover fraud against the Government [470]. Public agencies lack sufficient resources to identify many violations of federal law, and this procedure relies on the private sector to bring violations to the Government's attention. (A *qui tam* action cannot be pursued if it is based on information that has already been publicly disclosed by someone other than the initiator.) The lack of a compensatory focus is evident in the fact that an individual can serve as a *qui tam* plaintiff even without having suffered harm [471].

(b) Parens patriae *actions*

The second example of hybrid public-private procedures are *"parens patriae"* actions under US antitrust laws. The common law doctrine of *parens patriae* creates an exception to normal standing requirements in US courts, which require a plaintiff to establish some harm to its own legally protected interest. The doctrine permits States to bring suit not only on their own behalf, but on behalf of their citizens. In certain areas of law, including antitrust, this form of standing to assert "quasi-sovereign interests" has been incorporated into statutory law. The

469. See generally D. Engstrom, "Private Enforcement's Pathways: Lessons from *Qui Tam* Litigation", 114 *Columbia Law Review* 1913 (2014).

470. In this sense it is similar to traditional whistleblowing provisions, which simply reward whistleblowers for bringing information to the attention of public regulators. However, whistleblowing procedures do not contemplate a role for the whistleblower in any ensuing enforcement proceeding.

471. For a proposal to vest the SEC with similar oversight powers in securities fraud litigation, see A. Rose, "Reforming Securities Litigation Reform: Restructuring the Relationship between Public and Private Enforcement of Rule 10b-5", 108 *Columbia Law Review* 1301 (2008).

Clayton Act includes a provision empowering State attorneys general to initiate ordinary civil litigation under the antitrust laws on behalf of consumers injured by anti-competitive conduct [472]. This procedure was added to US antitrust laws in the late 1970s, to address the concern that existing enforcement procedures did not adequately protect consumers in cases involving small overcharges.

Parens patriae actions under antitrust law serve a number of different purposes. First, because they are initiated by parties other than the federal antitrust agencies, they multiply the resources available to detect and pursue regulatory violations. Second, by increasing the likelihood that companies violating the competition laws will be held to account, they serve a deterrent function. Third, they can serve a compensatory function. The damages awarded in such actions can be retained by the State as a civil penalty, but can also be distributed at the order of the court. One section of the statute specifically provides that individuals who have been harmed by the conduct in question are expected to receive an appropriate portion of the award unless that result is administratively impossible [473].

This kind of mechanism is available outside the context of antitrust law as well. Many States have enacted consumer protection statutes, for example, that expressly confer *parens patriae* authority on their attorneys-general [474].

(c) *Fair funds*

The final example of a hybrid procedure is a device used in the context of securities regulation. For the most part, the Securities and Exchange Commission's enforcement activity does not directly benefit investors who have been harmed by securities fraud. However, the SEC typically seeks disgorgement of profits earned through unlawful conduct. The SEC distributes funds collected in that way to injured investors whenever possible. That distribution is not always feasible or practical, however, and the proceeds of disgorgement often remain

472. See 15 USC, § 15 *(c)* (providing in part that "any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State . . . to secure monetary relief as provided in this section for injury sustained by such natural persons . . .").

473. 15 USC, § 15e.

474. See, e.g., Rev. Code Wash., § 19-86-080 (West 2007) ("The attorney general may bring an action . . . as parens patriae on behalf of persons residing in the state against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful . . .").

with the US Treasury [475]. The SEC may also impose monetary penalties, through either judicial or administrative proceedings. Historically, these penalties were by law payable only into the US Treasury [476].

In 2002, a provision was included in the Sarbanes-Oxley Act that authorized the SEC to distribute any monetary penalties imposed by judicial or SEC orders to investors, through the use of so-called "fair" (Federal Account for Investor Restitution) funds [477]. Under that provision, as subsequently amended by the Dodd-Frank Act, the SEC can order the distribution of both civil fines and disgorged profits to defrauded investors [478]. In effect, then, fair funds can be used to channel compensation to those harmed by securities law violations.

Because the creation and distribution of fair funds follows the conclusion of an ordinary public regulatory proceeding, whether judicial or administrative, this device does not increase the resources available to detect violations. In practice, fair funds simply permit the distribution of monetary penalties to individual investors. In this sense, the compensatory function they serve is incidental to the deterrence function that is the primary objective of civil penalties. This is reinforced by the fact that the creation of a fair fund does not necessarily preclude subsequent civil litigation arising out of the same violations. Indeed, in some cases the SEC has explicitly clarified that any distributions of penalty amounts made to investors through fair funds do not offset or reduce any subsequent recovery obtained in related civil litigation initiated by investors [479].

(d) *A comparative note*

The foregoing are examples of public-private hybrids taken from the US legal system. Other legal regimes, particularly in the civil law realm,

475. V. Winship, "Fair Funds and the SEC's Compensation of Injured Investors", 60 *Florida Law Review* (2008) 1103, at 1113.

476. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429 (1990) (codified as amended at 15 USC, § 77t *(d)* (3) (A) (2006).

477. 15 USC, § 7246 *(a)* (2006). For general discussion see Barbara Black, "Should the SEC Be a Collection Agency for Defrauded Investors?", 63 *Bus. Law.* 317 (2008).

478. Prior to amendment by the Dodd-Frank Act, the device could only be used to distribute the proceeds of civil penalties if the defendant was also subject to a disgorgement order. As Professor Black noted, "[t]he SEC . . . consistently evaded [this] limitation by including a nominal $1 disgorgement amount to allow distribution of corporate penalties to investors". Dodd-Frank permits the use of fair funds even when only civil penalties are imposed.

479. See, e.g., *In the Matter of Alliance Capital Management, L.P.*, Respondent, Release No. 2205A (15 January 2004).

have historically maintained more rigid distinctions between private and public enforcement that preclude these sorts of arrangements. For instance, the explanatory memorandum that accompanied the European Union's proposal for a directive on damages for violations of competition law states explicitly that

> "[c]ompensation for harm caused by infringements of EU competition rules cannot be achieved through public enforcement. Awarding compensation is outside the field of competence of the Commission . . . and within the domain of national courts and of civil law and procedure." [480]

This divide is also reflected in national systems that strictly separate public and private enforcement. In Italy, for example, certain qualified associations can initiate actions in administrative courts for injunctive relief [481]. Individuals seeking monetary damages, however, must follow up with separate actions in civil court [482].

Nevertheless, there are some exceptions to the general principle of strict distinction between public and private enforcement in civil law systems. The "action civile" mechanism in France, for example, blends public and private elements. That procedure permits an individual who has suffered an economic loss as the result of a criminal violation to attach a civil claim for monetary damages to a criminal prosecution [483]. Upon a finding of criminal liability, the civil party will be awarded monetary damages without the need to file an additional lawsuit. (Under certain circumstances, the victim may be able to petition for compensation even following a criminal acquittal.) In 2017, the French Ministry of Justice proposed legislation that included another type of hybrid procedure: a "civil penalty" [484]. The relevant provision would permit the plaintiff in tort litigation to request that a penalty be imposed on the tortfeasor. Depending on the nature of the harm, the proceeds would be paid either into a compensation fund or into the public treasury. This device would be available in cases in which the defendant had wrongfully enriched itself through tortious conduct.

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480. Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provision of the Member States and of the European Union, COM(2013) 404, Explanatory Memorandum, para. 1.1.

481. Consumer Code, Art. 140.

482. Consumer Code, Art. 140*bis*.

483. Article 418, French Code of Criminal Procedure.

484. Reform Bill on Civil Liability, 13 March 2017 (transl. Simon Whittaker), Art. 1266-1.

2. Transposing hybrid procedures to the transnational plane

Hybrid proceedings can avoid some of the jurisdictional constraints that limit the use of ordinary civil litigation to regulate transnational activity. As a result, although such proceedings are conducted within a particular domestic legal system, they permit the regulating entity to consider foreign as well as local harms arising from regulatory violations. In that sense, hybrid proceedings offer greater flexibility than traditional forms of private enforcement in addressing transnational harms. Consequently, they may be more effective in pursuing some of the important objectives outlined above – most critically, securing compensation for a greater proportion of the individuals and entities injured by unlawful conduct, and thereby increasing deterrence.

This section explores the possible extension of two of the mechanisms described above to the cross-border context. In light of the risk of substantive conflict discussed in Chapter III, the analysis focuses on forms of transnational activity that violate widely-shared substantive norms: for example, global cartels, money laundering schemes, or accounting fraud within multinational enterprises.

(a) *Claims by US regulators*

Consider a situation in which a US company whose securities are cross-listed in other jurisdictions commits accounting fraud. That fraud affects all holders of its securities: those who purchased their securities in the United States, and those who purchased on foreign markets. Under the rule articulated in *Morrison*, US anti-fraud law applies only to claims arising from a US securities transaction. Thus, only investors who purchased their securities in the United States could sue in US federal court [485]. Foreign investors seeking compensation for the same fraud would have to look elsewhere. Some foreign investors might have access to effective redress in their home jurisdictions under local procedures facilitating private litigation. If they were to sue there, the result would be adequate compensation of all investors involved – albeit at the cost of duplicative litigation. Others, however, might not have access to effective redress. In that case, the result would be disparities among investors with respect to compensation, with the

485. Technically, a court might exercise supplemental jurisdiction over the claims of foreign investors in such a case, deciding them pursuant to foreign securities law. In practice, courts decline to do so.

attendant possibility that the overall gains from the fraud exceeded the total damages awards.

The US Securities and Exchange Commission could also take enforcement action against this issuer. Unlike in private securities litigation, the resulting proceeding could account for the interests of all investors. As we have seen, Dodd-Frank legislatively overruled the holding in *Morrison* with respect to public enforcement [486]. In other words, in an administrative or judicial proceeding initiated by the SEC, US law still applies to claims arising from foreign securities transactions, to the extent that fraudulent conduct in the United States caused the relevant losses. If the proceeding resulted in a disgorgement order and/or a civil penalty, the SEC could use the fair fund mechanism to compensate all injured investors – not only the US investors, but the foreign investors as well [487].

This approach would permit the regulating agency to look beyond the impact of the fraudulent activity within its own territory, taking a broader view of the fraud's full transnational effects. As a consequence, the agency could impose a penalty and/or require disgorgement in amounts more likely to achieve adequate deterrence. In addition, this mechanism would more effectively secure compensation for investors harmed by the fraudulent conduct. For some investors, the result would be access to compensation that might otherwise be unavailable, due to the absence of direct and effective redress in their home jurisdiction. For the investor group as a whole, the result would be an efficient distribution of compensation that did not require multiple duplicative proceedings.

This example builds on the observation above that hybrid mechanisms are free of some of the jurisdictional constraints that affect traditional forms of private enforcement. It is offered in support of the argument that as a result of that flexibility, hybrid regulatory proceedings may be more effective than traditional private enforcement in addressing certain transnational harms. However, it is not intended to suggest that the use of such proceedings in the cross-border context would never generate

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486. See *supra*, Chapter III.

487. In fact, the SEC has in the past made fair funds distributions to foreign investors. See, e.g., the Distribution Plans in relation to the settlement with Vivendi Universal, available at http://www.vivendisecsettlement.com, and the settlement with Royal Dutch Shell, available at http://www.shellsecsettlement.com. These particular distributions were made prior to the *Morrison* decision, but there is no reason they could not be made today, since the source of the funds distributed is a penalty imposed in the course of a public regulatory proceeding.

conflict. For instance, if the issuer in the example above were a foreign company rather than a US company, other States might legitimately object to the application of US anti-fraud law in a "global" proceeding simply because a subset of investors was located in the United States. To avoid such conflict, some regulatory agreement or practice might be necessary in order to limit the availability of fair funds distributions in particular cases.

Moreover, complications might arise at the intersection of public and private process. As noted above, fair fund distributions of penalties do not necessarily preclude follow-on civil litigation by harmed investors. In the scenario described above, US investors could initiate a civil lawsuit in US court following completion of the public regulatory proceeding. By the same logic, foreign investors located in systems that provide effective private rights of action could also initiate follow-on litigation there. The result would risk over-compensating some investors, and perhaps over-penalizing the target company [488]. Again, steps to mitigate such conflict would be necessary, perhaps in the form of requiring that all fair funds distributions offset any subsequent recovery in civil litigation.

(b) *Claims by foreign States in transnational cases*

As we have seen, States often object to private litigation in foreign courts as a method of transnational regulation because of the various forms of conflict such litigation presents. Nevertheless, States themselves seek access to foreign courts in some circumstances – as plaintiffs in civil litigation. Such claims most frequently involve ordinary contract disputes or other situations involving a proprietary interest of the plaintiff State. In the United States, however, some claims exhibit a more regulatory aspect.

Recall the case of *RJR Nabisco*, discussed in Chapter III. There, the European Community initiated a lawsuit in US court under RICO, alleging a global scheme that included the use of smuggling channels by way of Panama and Cyprus, and bank accounts in "money-laundering havens such as Panama and Switzerland" [489]. The claim is particularly

488. That risk may be more theoretical than actual. A major empirical study of fair funds distributions concluded that "[m]ore often than not, the SEC compensates harmed investors for losses where a private lawsuit is either unavailable or impractical". U. Velikonja, "Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions", 67 *Stanford Law Review* (2015) 331, at 336.

489. *European Community* v. *RJR Nabisco, Inc.*, 355 F. 3d 123 (2d Cir. 2004).

interesting in that it conceptualizes civil litigation in a domestic court as part of the global regulatory system. In its brief to the federal court of appeals, the European Community noted specifically that RICO – with its private attorney general mechanism – was intended not only to protect domestic interests but also "to pursue transnational organized crime directed against foreign allies" [490]. To support this suggestion, the European Community cited at length the legislative history of the US PATRIOT Act, including the statement of one senator assuring that "[America's] allies will have access to [US] courts and the use of [US] laws if they are the victims of smuggling, fraud, money laundering, or terrorism" [491]. The European Community thus highlighted not only the willingness of US legislators to leverage the deterrent function of private actions under US law for the benefit of the global community, but also its own willingness to accept a role for US national courts in regulating global misconduct.

In the resulting opinion, the Supreme Court recognized that regulatory claims initiated by foreign States do not present the same type of inter-State political conflict that regulatory claims initiated by private plaintiffs do. It noted the assurances of the foreign States that adjudication of their complaint would "respect[t] the dignity of foreign sovereigns". However, the Court stated that its interpretation of the geographic scope of RICO's private cause of action would affect not only the suits of foreign States but also "suits by nongovernmental plaintiffs that are not so sensitive to foreign sovereigns' dignity" [492]. Declining to adopt a "double standard", it eliminated the private right of action for all claimants whose injuries had been suffered outside the United States.

This decision could be reversed by legislative action. In the wake of *Morrison*, Congress acted to restore the extraterritorial reach of securities anti-fraud law in cases initiated by US securities regulators. Similarly, Congress could restore the availability of RICO's private

490. Brief for Plaintiffs-Appellants, *European Community* v. *RJR Nabisco*, 424 F. 3d 175 (2d Cir. 2005), at 46.

491. *Ibid.* at 30-32 (citing statement of Senator Kerry). See also *ibid.* at 43, citing a related statement noting that

> "Since some of the money-laundering in the world today also defrauds foreign governments, it would be hostile to the intent of [the Patriot Act] for us to interject into the statute any rule of construction of legislative language which would in any way limit our foreign allies access to our courts to battle against money laundering."

492. 136 S. Ct. at 2108.

right of action in cases based on foreign injuries, where foreign States bring the resulting claims. This would deploy additional enforcement resources to combat transnational criminal activity, without risking the type of conflict among legal regimes that RICO litigation initiated by private foreign claimants would present.

Although it is beyond the scope of the current discussion, it is interesting to note that foreign States have initiated lawsuits in US courts in a different regulatory context as well. These lawsuits are brought against US companies and seek damages for harms allegedly caused by those companies' foreign business operations. Such lawsuits often claim compensation for injuries suffered by local populations. For instance, many foreign States have sued US companies to recover damages for harm to their citizens' health caused by the sale of tobacco products within their borders, or by the environmental impact of local business operations. These cases are quite different from cases involving global cartels or money laundering. They are difficult to regulate not because they involve widespread injury across multiple countries; rather, they are difficult to regulate because they risk falling into gaps between regulatory regimes. This can happen for a number of different reasons, including institutional barriers facing individual claimants in the particular foreign States. In one such case, for example, the Dominican Republic filed a complaint in US federal court against a utility company headquartered in Virginia [493]. The complaint alleged that the company's operation of power plants in the Dominican Republic had damaged the environment there and created health risks for local citizens. It argued that those citizens would not be able to secure redress in local courts.

As in *RJR Nabisco*, this type of case involves the decision of a foreign State to deploy civil litigation in US courts in order to close a regulatory gap. As plaintiff in the case described here, the Dominican Republic sought to defuse any concerns about the risk of political conflict, arguing that it

> "furthers the national and sovereign interests of the Dominican Republic and its citizens to seek compensation in the federal

493. First Amended Complaint, para. 1, *Gov't of the Dom. Rep.* v. *AES Corp.*, 466 F. Supp. 2d 680 (ED Va. 2006) (No. 06-313). This complaint, and others asserting similar arguments, is discussed in detail in H. Buxbaum, "Foreign Governments as Plaintiffs in US Courts and the Case against 'Judicial Imperialism'", 73 *Washington and Lee Law Review* 653 (2016), 679-688.

courts of the United States for the unlawful acts of American corporations" [494].

To bring such claims on behalf of their citizens, the foreign States must act in *parens patriae*. The Supreme Court has not directly addressed the question whether foreign States are entitled to *parens patriae* standing in US courts. The leading federal case to address the issue declined to extend such standing to foreign Governments [495]. The appellate court reasoned that the source of the *parens patriae* right for US states was their position within the federal system of government – a system in which "a foreign nation has no cognizable interests" [496]. The court recognized an exception, however, in the circumstance that either the Supreme Court or the political branches had indicated a clear intent to permit such standing. Here, such standing could be extended by legislation. Doing so might open a path to securing compensation for those injured by certain forms of cross-border activity, thereby addressing conduct that would otherwise go unregulated.

D. Looking Ahead

This chapter has explored the synthesis of public and private regulatory elements in two different contexts: hybrid systems and individual hybrid proceedings. The goal of the analysis has been to consider ways to leverage private enforcement resources without generating the type of conflict that traditional private enforcement typically creates.

It is possible to imagine entirely different ways to serve the ultimate objective of effective transnational economic regulation. These might include procedural forms that operate outside the confines of national legal systems. For instance, the growth of transnational regulatory networks suggests another avenue. In addition to their core function of improving co-operation in the enforcement of national laws, these networks already serve other purposes, including standard setting in their respective fields of regulation. With increasing institutionalization, such networks might in the future play a more direct role in cross-border enforcement as well. For example, they could support and administer claims settlement systems that would aggregate and resolve

494. First Amended Complaint, para. 1.
495. *Estado Unidos Mexicanos* v. *DeCoster*, 229 F. 3d 332 (1st Cir. 2000).
496. *Ibid.* at 339.

all individual claims, whatever their country of origin, against entities found to have engaged in certain globally condemned activity such as price-fixing.

As long as national law remains the primary source of economic regulation, however, the effectiveness of any enforcement mechanism – whether in the private realm, the public realm, or somewhere between the two – will depend in part on mitigating the conflicts it creates within and among legal regimes. The framework laid out here is designed to assist in that task.

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